United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,297
No. 21,585

JAMES BAILEY,

Appellant

V.

UNITED STATES OF AMERICA,

Appellee

No. 21,298
No. 21,586

RONALD HUMPHRIES,

Appellant

V.

UNITED STATES OF AMERICA,

Appellee

BRIEF FOR APPELLANTS

United States Court of Appeals
for the District of Columbia Circuit
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6. Did the Trial Court commit prejudicial error by refusing to instruct the jury on the lesser included offense of simple assault?

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JURISDICTIONAL STATEMENT

This is an appeal in forma pauperis from a conviction of carnal knowledge, D.C. Code Title 22, Sec. 2801 (1967 ed.). Both appellants were convicted under a one-count indictment on June 21, 1967 and sentenced on August 25, 1967. This Court has jurisdiction pursuant to Title 28 U.S. Code, Sec. 1291.

STATEMENT OF THE CASE

The appellants were charged with carnally knowing a female child, one Vivian Robinson, who was fifteen years and ten months old at the time of the alleged offense on March 27, 1966.

The trial commenced on June 12, 1967. Prior to voir dire, defense counsel requested the prosecution to indicate whether or not it intended to request the death penalty. The Government indicated that it did not intend to seek the death penalty(Tr. p. 7); whereupon, the defense requested the Court to rule that it would be improper for the prosecution to question the panel as to their views on the death penalty. This was denied (Tr.p.8).

The prosecution proceeded to qualify the prospective jurors on the death penalty and the Court excused seven members of the panel for cause, based on their stated opposition to the death penalty(Tr.p.22-29).

The Government's evidence charged that in the early evening hours of Sunday, March 27, 1966, the complaining witness accompanied the appellants and two juveniles to the basement laundry room of 76 Forrester Street, S.W. in the District of Columbia, and there on the basement floor, after the lights were turned out, she was sexually attacked four or five times (Tr. p. 69-70). Vivian Robinson testified that she voluntarily accompanied the boys to the southwest address, but when she turned to leave, one of the juveniles grabbed her and dragged her into the laundry room where she was attacked (Tr. p. 63-64).

The Government's evidence further disclosed that while the attack was in progress, a resident opened the laundry room door and, upon observing that the lights were out, returned up the steps toward her apartment. The witness, Mrs. Elizabeth Johnson, testified that when she was about half way up the steps, a group of boys ran out of the back door of the basement and the complaining witness came out of the laundry room and asked if she had a telephone (Tr. p. 207). Mrs. Johnson testified that the girl was crying and said that she had been raped (Tr. p. 212).

Mr. William E. Lewis testified for the Government that the girl used his telephone, that she was crying, and that she had some dirt, or a little dust, on her dress (Tr. p. 230).

The Government called Andrew Ford, a juvenile who admitted that he was "involved" and who was, at that time, serving a sentence for the same charge at the National Training Center. The juvenile stated that he had had sexual intercourse with Vivian Robinson on the day and time in question (Tr. p. 241) but, when pressed for details, stated that the girl had gone under the basement stairs with him voluntarily and that he did not actually penetrate her (Tr. p. 244-245). He further testified that none of the boys had relations with the girl (Tr. p. 247).

On cross-examination, Andrew Ford admitted that he had been circumcized on March 2, 1966 prior to the alleged attack on March 27, 1966 and that he had returned to the hospital on March 18, 1966 due to difficulties with the operation (Tr. p. 253). Mr. Ford further

testified that he did not penetrate the girl, that none of the boys sexually abused or attacked the girl in any way (Tr. p. 257, 260).

Detective Sergeant Demilt testified that he investigated the charge, took the complaining witness to the District of Columbia General Hospital for an examination and obtained her clothes which he turned over to the Federal Bureau of Investigation for tests. He testified that the F.B.I. lab report for blood and semen was negative (Tr. p. 311-312).

Fingerprints of the appellant Bailey were stipulated to by the defense as having been taken from a light bulb which was found in the basement of 76 Forrester Street, S.W. (Tr. p. 371).

Mrs. Robinson, the mother of the complaining witness, testified that when the girl arrived home she was distraught, that she was wearing her underpants, that she examined the girl's pelvic area and found a discharge which she cleaned with a washcloth. She further testified that her daughter wore the same pants to the hospital where she turned all of her clothes over to the police (Tr. p. 284-285, 290-291).

The defense called the doctor who examined the girl at D.C. General Hospital. The doctor testified that she took vaginal smears for three slides, all of which were negative for sperm (Tr. p. 401); that the girl had no gross evidence of trauma, was not hysterical and that there was no evidence of penetration (Tr. p. 394-399, 402).

The defense also called Dr. Steele Fuller Stewart, a diplomate

of the American College of Obstetricians and Gynecologists, who testified in response to a detailed hypothetical question that, in his opinion, the complaining witness had not had sexual intercourse with anyone on the day and time in question (Tr. p. 554, 555).

The F.B.I. agent testified to the chemical and physical tests which he performed on the clothing worn by the complainant and stated that the tests were negative for semen and blood (Tr. p. 436-437).

Both appellants testified in their own behalf that they were with the girl on the date as alleged, but both denied that they or anyone else had sexual intercourse with her (Tr. p. 502-503, 592-593).

The jury deliberated approximately five hours and returned verdicts of guilty against both defendants. The defendants were sentenced pursuant to Title 18 U.S.C. 5010-b, The Federal Youth Corrections Act.

On August 17, 1967, the other juvenile was tried on the same charge in the Juvenile Court. He was acquitted by the Judge sitting without a jury. Appellants' counsel obtained a transcript of the testimony of the complaining witness and her mother and filed a Motion for a New Trial, based on newly discovered evidence, alleging that the witnesses deviated substantially in their testimony at the trial in Juvenile Court. This motion was denied by the District Court without hearing on December 27, 1967. An appeal from the denial of this motion was noted and consolidated with the principal appeals from the convictions.

STATEMENT OF POINTS

1. It was error for the Trial Court to permit the jury panel to be questioned on their belief in the death penalty after the prosecution stated that the Government did not intend to request the death penalty. This was a denial of due process of law as guaranteed by the Fifth Amendment and denied the appellants trial by an impartial jury as guaranteed by the Sixth Amendment.

2. There was insufficient evidence to submit the case to the jury and the Court should have granted the appellants' motions for judgment of acquittal at the close of the Government's evidence and at the close of all the evidence.

3. There was insufficient evidence of corroboration of the corpus delecti to sustain a conviction.

4. The Trial Court committed error by commenting on the Government's evidence in her instructions to the jury.

5. The Trial Court committed error by excluding evidence to impeach the veracity of the complainant by:

a) Sustaining objections to questions to a defense witness regarding prior accusations by the complainant which the complainant had denied during cross-examination (Tr. p. 475-480).

b) Excluding the police report of the complainant, R.D. 251 which was proffered to show inconsistencies in the complaint's testimony

at trial. (Tr. p.633-634)

6. The Trial Court committed error by refusing to instruct the jury on the lesser included offense of simple assault.

7. The Trial Court committed error by denying the Motion for a New Trial based on inconsistencies in the testimony of the complaining witness and her mother at a subsequent trial relating to the same offense for which these appellants were convicted.

SUMMARY OF ARGUMENT

The Government did not seek the death penalty at trial; yet the Court permitted the prosecutor to qualify the jurors on the death penalty and seven jurors were excused for cause. This was a denial of trial by an impartial jury as guaranteed by the Sixth Amendment.

Appellants contend that when the death penalty is not in issue, it is prejudicial to permit death qualification of the jury. This qualification excludes those jurors with humanitarian views and enables the Government to obtain a more prosecution-prone jury.

Recent studies tend to establish that those persons who are not opposed to capital punishment possess an authoritarian personality which is characterized by feelings of moralistic condemnation, extrapunitiveness, distrust, suspicion, and other qualities making them less partial to the presumption of innocence to which the accused is entitled.

The death-qualified jury constituted a denial of trial by an impartial jury and a denial of due process of law.

There was no independant corroboration of the corpus delecti. Other than the testimony of the prosecutrix, there was no evidence offered to show that she was sexually penetrated. The complainant testified that she was forcefully raped by four or five males; yet, no evidence corroborated this claim.

It is contended that the evidentiary requirement of corroboration is most important when the medical report from a Government hospital

shows no signs of penetration; a Government witness who was present during the alleged attack denies that the girl was sexually attacked; and, the F.B.I. laboratory report is negative for semen and blood on the clothes the girl was wearing.

Appellants urge this Court to clarify the corroboration rule in carnal knowledge cases and require some independant evidence to support sexual penetration.

The trial court summarized the Government's evidence of corroboration in her instructions to the jury, thereby giving undue emphasis to this critical issue in favor of the prosecution. During this summary, the Court incorrectly stated that the brother of James Bailey testified and identified the appellant as being present. This error was corrected, but, with an additional emphasis on the case for the prosecution.

Appellants contend that the Court exceeded the boundaries of fair comment and assisted in pursuading the jury in the Government's favor by this summary.

Evidence of prior false accusations of a similar nature made by the prosecutrix should be admissible to impeach her veracity and her character.

Trial counsel proffered the testimony of a witness who would have stated that the complainant had previously claimed that she had had sexual relations with one Derrol Johns. Derrol Johns was also present in court

and was prepared to testify that he had not had intercourse with the complainant. The Government's objection to this testimony was sustained.

This evidence should have been admitted to show a disposition to make false sex claims; to establish that the character of the complainant was such that a prior false claim, similar to the claim on trial, had been made; and, that her veracity was suspect.

The prosecution's case, taken in its most favorable light, was not sufficient to sustain a verdict of guilty. The defendants' motions for directed verdicts of acquittal were denied at the close of the Government's case and at the conclusion of the trial.

Appellants contend that when the available technical evidence tends to prove that a sexual attack did not in fact occur, then, absent other competent corroborating evidence, a directed verdict of acquittal should be entered.

The trial court declined to instruct the jury on the lesser included offense of simple assault. It is asserted that this offense is encompassed by the elements of carnal knowledge and assault with intent to commit rape. Trial counsel also pointed out to the Court the evidence to support this charge, which was plausible and credible. A possible jury verdict on this lesser offense was foreclosed to the jury and constitutes prejudicial error.

Trial in the instant case was concluded on June 21, 1967. A juvenile was tried on the same charge the following August. At this subsequent trial, the complainant and her mother changed their testimony on

several material issues and the juvenile was found "not involved." Trial counsel obtained a transcript of this testimony and filed a Motion for a New Trial, asserting the material discrepancies as newly discovered evidence. This motion was denied without a hearing on December 27, 1967.

It is asserted that the trial court should have examined the testimony in an advesary proceeding due to the substantial changes in the testimony, and because that testimony produced different results on the same set of facts.

A review of the testimony shows changes in the testimony pertaining to material matters and that these changes evolved after a very short interval of time. It is asserted that these discrepancies amounted to new evidence and the obvious conclusion that these key Government witnesses were lying in one trial. This evidence was sufficient ground for a new trial.

ARGUMENT

I.

Was there a denial of due process of law under the Fifth Amendment to the Constitution, and a denial of trial by an impartial jury under the Sixth Amendment when the trial court permitted the Government to question the jury panel during voir dire as to their belief in capital punishment and to excuse prospective jurors for cause who were opposed to capital punishment when the Government conceded on the record that it did not seek imposition of the death penalty?

The appellants contend that they were denied a trial by an impartial jury because those jurors with conscientious objections to the death penalty were excused for cause when the death penalty was not sought by the prosecution.

Prior to voir dire, the defense questioned Government counsel as to whether the death penalty was sought. The prosecutor conceded that he was not asking for the death penalty (Tr. p. 7) The defense then requested that the Government not be permitted to question the jury panel as to whether anyone maintained any conscientious objections to the death penalty. This request was denied and seven prospective jurors were excused for cause(Tr. p. 22-29).

The appellants contend that when the death penalty is not in issue the jury should not be "death-qualified."

The statute proscribing the offense of rape states that "The jury may add to their verdict, if it be guilty, the words 'with the death penalty,' ..."[1/] This, however, is an exclusive function of the jury and is not the

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1. District of Columbia Code, 22-2801 (1967 ed.).

province of the Government when it is admittedly not seeking a death sentence.

A striking contrast is suggested by the former D.C. Code provision which required imposition of the death penalty upon conviction of murder in the first degree.[2/] Prior to the 1962 Amendment, a conviction required a mandatory execution of the death penalty. Under that statute, a juror with a moral, ethical, or religious conviction against the ultimate penalty might reasonably be considered inclined toward a life-saving, not quilty verdict. Clearly then, his views on the death penalty were in issue and a "death-qualified" jury was necessary to insure the Government a fair trial.

Here, the death penalty was not mandatory and not sought by the Government. Why then should the prosecution be entitled to obtain a death-qualified jury when it is not affirmatively seeking this punishment? There is only one logical answer. This qualification eliminates those panelists with humanitarian views and provides a panel that is more prosecution prone.

The Sixth Amendment to the U.S. Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right to a...

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2. D.C. Code 22-2404 "The punishment of murder in the first degree shall be death by electrocution..." (March 3, 1901, amended by the Act of March 22, 1962)

trial by an impartial jury..."

The appellants contend that in the case at bar, a death-qualified jury was neither necessary nor impartial. It is urged that by excusing those jurors with conscientious objections to the death penalty the remaining panel was more authoritarian, more sympathetic to the prosecution, and more partial against the appellants. This factor is particularly significant in a carnal knowledge case when the natural sympathies of most people would favor the plight of a young girl who had allegedly been abused by four or five males.

The term "death-qualified jury" has attracted considerable attention since 1961 when Professor Oberer of the University of Texas Law School published an article entitled "Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of a Fair Trial on Issue of Guilt?"[3/]

Oberer's thesis is that the jury's primary function in a capital case to determine the issue of guilt or innocence and that this function is adversely affected by eliminating those jurors who are opposed to the death penalty. He states, at page 549, that

> A jury qualified on the death penalty will necessarily have been culled of the most humane of its prospective members...and when it is further considered that the issue of guilt or innocence in the less important cases - the non-capital case--is determined by a jury not similarly shorn of its

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3. 39 Tex. Law Review 545 (1961)

most humanely disposed constituents, the result becomes even more ironic: The graver the charge the less the protection accorded the accused.

In other words, a jury qualified on the death issue, to the prosecution's satisfaction, is correspondingly not qualified to decide innocence or guilt from the defense standpoint.

Recent studies relate certain personality factors to those persons who favor the death penalty. The basic study on the subject in this regard is entitled The Authoritarian Personality,[4] wherein the theory is advanced that the attitudes of those who favor capital punishment reflects a high degree of distrust of their fellow man. They maintain strong feelings of moralistic condemnation, extrapunitiveness, distrust, suspicion, a hierarchial conception of human relations; that they are non-love seeking, exploitive, manipulative and possess strong feelings of survival of the fittest.

There has been one empirical study into this problem, testing the dinamics of applied psychology on actual jurors. The results of this study are contained in a dissertation entitled "An Investigation into Certain Personality Variables Among Capital Trial Jurors" by Robert F. Crosson.[5]

Dr. Crosson chose thirty-six death-qualified jurors from Cuyahoga County, Ohio and compared their personality traits with thirty-

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4. By Adorno, Frentel-Brunswick, Levinson and Sanford (Harper, 1950).

5. Doctor's Dissertation, 1966, Western Reserve University, Dissertation Abstracts No. 67-4587.

six jurors selected at random from non-capital cases.[6] The study details the raw scores on each juror on each personality characteristic and the author's conclusion states that "results showed that the rightest authoritarians are significantly more prevalent among death-qualified jurors."

Dr. Crosson further concludes,

> If anti-authoritarian traits are as likely to be represented on the jury as authoritarian traits, then the results of this study suggest that removal of the death qualification from the capital voir dire would be a step in the direction of fairer representation which might better serve justice instead of just the prosecutor.[7]

The question of the death-qualified jury was considered sua sponte by this Court in Turberville v. United States, 112 U.S. App. D.C. 946, 303 F. 2d. 411 (1962); however, the question arose in an entirely different context from the instant appeal as the objection had not been raised at trial, nor had the Government stated affirmatively that it was not seeking the death penalty. The Court posed the issue in the following manner:

> ...however our own inquiry has brought to our attention another thesis in this area of the law. It is that persons who are not opposed to capital punishment are psychologically inclined against criminals and therefore a jury composed of such persons is not an impartial jury. We understand that this thesis has not

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6. The study tested each juror for authoritarianism using the Rokeach Dogmatism Scale; critical thinking using the Watson-Glaser Critical thinking Appraisal; and for manifest hostility on Siegel's Manifest Hostility Scale.

7. Ibid page 82.

as yet received the sanction of any court. We cannot accept it. We examine it because this is a serious case and if the thesis were tenable it might cause reversal...303 F. 2d. 420

The appellants position is that this thesis is now tenable, based on the studies cited herein, particularly the study by Dr. Crosson.

The primary responsibility of the jury - this jury, or any jury - is the determination of guilt or innocence. When, as here, this function is impared by the injection of a question not in issue, and the jury is selected partially on that basis, and, as is contended, a non-representative, prosecution-prone jury results, then the constitutional mandate for trial by an impartial jury is qualified.

The Supreme Court recently granted certiorari in Witherspoon v. Illinois[8] limited to the following question:

> Whether the operation of the Illinois statute providing that the State could challenge for cause all prospective jurors who were opposed to, or had conscientious scruples against, capital punishment deprive the petitioner of a jury which fairly represented a cross section of the community, and assured the state of a jury whose members were partial to the prosecution on the issue of guilt or innocence, in violation of the petitioner's rights under the Sixth and Fourteenth Amendments to the United States Constitution.

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8. 344 Misc., now designated as No. 1015, 36 Law Week 3286. The petition for certiorari was granted on January 15, 1968.

Witherspoon was convicted of murder and the sentence was fixed as death by the jury. The Illinois Code provides that the jury may fix the punishment at death in murder cases.[9]

Certiorari was also granted on the same day in Bumper v. North Carolina[10] in which the same question has also been raised. Bumper was convicted for rape and assault with a dangerous weapon. Trial counsel objected to the voir dire qualification of jurors as to their views on the death penalty. He was overruled and sixteen jurors were excused for cause. The defendant was convicted and given consecutive sentences of ten years and life.[11]

This Court is urged to recognize that a jury panel composed entirely of citizens who are not opposed to the death penalty will contain some members with an authoritarian personality. This presupposes that the Court will accept the thesis by Adorno, Crosson and others as valid.[12] If then, this premise is valid, it is urged that it is improper to permit the Government to qualify a jury on the death penalty when this

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9. Chapter 38, Sec. 801, Ill. Rev. Stat. 1959.

10. 678 Misc., now designated as No. 1016 Appellate Docket, 36 Law Week 3286. Certiorari was granted on January 15, 1968.

11. This issue was also before this Court in David I. Sims v. United States, No. 21,300, Brief for Appellant, p. 26.

12. See also, Wilson, "Belief in Capital Punishment and Jury Performance." The Texas Observer, November 27, 1964, p. 5.

punishment is not sought, for to do so is to deprive the defendant of an impartial jury as guaranteed by the Sixth Amendment.

II

Is there sufficient corroboration of the corpus delecti in the offense of carnal knowledge when the complaining witness testifies that she was forcefully attacked four or five times and the medical examination shows no evidence of penetration and the F.B.I. laboratory report on the victim's clothing was negative for semen and blood?

It is generally conceded that the law in the District of Columbia requires corroboration of the prosecutrix' testimony in a charge of rape. Corroboration is required both as to identity of the assailant and of the corpus delecti. There must be independent proof that "point(s) to the probable quilt of the accused, or, at least, corroborates indirectly the testimony of the prosecutrix.[13]

In the instant case, there is no dispute as to the identity of the appellants. Independent corroboration by two witnesses was offered to establish that both appellants were with the prosecutrix at the time and place alleged. In fact, both appellants freely admitted that they were with the girl.

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13. Kidwell v. U.S., 38 App. D.C. 566, 573 (1912), Ewing v. U.S., 77 U.S. App. D.C. 14, 16-17, 135 F. 2d 633, 635-636 (1942); Roberts v. U.S., 109 U.S. App. D.C. 75, 284 F. 2d. 209 (1960); Thomas v. U.S., (D.C. Circuit 1967, Slip Opinion No. 20287).

The principal point relied on for this appeal is that there was no independent corroboration of the allegation that the complaining witness was sexually attacked - that she was in fact penetrated by a male sexual organ at the time and place alleged.

Appellants do not contend that corroboration must be from an eye witness or from medical evidence. Appellants do strongly contend that theere must be some circumstantial corroborating evidence in order to submit the case to the jury, and that this requirement must be carefully enforced in a case such as this where (1) the complainant is under sixteen; (2) she is not mentally bright;[14] (3) she is surprised by an adult in a basement area where she does not belong; and (4) the highly prejudicial and inflamatory nature of a rape upon a child.

Here, the evidence which the Government submitted as corroborating and which the Court instructed the jury "could be considered as corroboration" (Tr. p. 762) did not corroborate a sexual penetration. The prompt report to Mrs. Johnson corroborated that she was surprised by an adult in the basement, that dust on her dress was explained by the testimony of another Government witness.[15] In addition, the testimony of the girl's

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14. Testimony in general, and the fact that she was completing the ninth grade at age seventeen. (Tr. p. 48-49)

15. William E. Lewis testified at page 30 of the transcript that "...I think she had a little dirt on her dress like, like a little dust..." Andrew Ford testified (Tr. p. 259) that the girl attempted to hide with him behind one of the laundry machines and that he "pushed her away from me."

mother that she wiped a white discharge from her daughter's legs was refuted by the F.B.I. lab report which found no traces of blood or semen on her clothes.[16]

Furthermore, the medical report from D.C. General Hospital, which was introduced by the defendant, directly negated any penetration - and most certainly penetration by four or five males.

The majority of the cases cited herein as requiring corroboration concern the identity of the accused; or, establish corroboration of the corpus delecti in a medical report,[17] or in such matters as the condition of the complainant.[18]

The essential element of crime of carnal knowledge is penetration. There was no evidence to corroborate this element. The record reflects only proof that the girl was not in fact penetrated. Will this Court require corroboration of this specific element to sustain a conviction of carnal knowledge? If so, these convictions will be reversed.

Ewing v. United States, supra, is generally cited as requiring corroboration. It does in fact restate the rule of Kidwell and refuses to go further. In Ewing, the case was affirmed as there was sufficient corroboration, i.e., the lock on the door to the room of the prosecutrix was broken and medical evidence established that she had in fact had

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16. Tr. p. 437-438.

17. Thomas v. U.S., supra.

18. Walker v. U.S., supra.

intercourse for the first time.

This case is entirely different in that no evidence supports penetration - in fact, the evidence presented tended to prove that penetration did not in fact occur.

This argument is perhaps more applicable to the Curly rule in support of the defense's motion for a directed verdict of acquittal. However, the rule in this jurisdiction on corroboration should be clarified. The need for such was stated in Franklin v. United States.

> Although the danger of an erroneous identification in a rape case is not of the same magnitude as the danger of a fabricated rape, both dangers are comprehended in Lord Hale's warning against reliance on the prosecutrix testimony. . .[19]

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19. 330 F. 2d 205, 208 (1964).

III

Did the Trial Court deny appellants the right to a fair trial by summarizing the Government's evidence on corroboration in the jury instructions?

The Trial Court's instructions to the jury contained a summary of the evidence on corroboration, which, it is contended gave undue emphasis to this most critical point (Tr. p. 762-764). The Court did not attempt to summarize all of the evidence, or to balance the explanation of that part of the evidence favorable to the Government with a summary of evidence favorable to the defense.

In addition, in her summary of this evidence, the Court incorrectly stated that the brother of the defendant Bailey "identified James as one of the men present at the time and place in question" (Tr. p. 763), when in fact, the defendant's brother did not testify at all.

Trial counsel objected to this summary and pointed out that the Court had made an incorrect statement (Tr. p. 775 colloquy to p. 777).

The Court then corrected this statement by further instructing the jury and further emphasizing the evidence in favor of the Government (Tr. p. 777-778).

The crucial element in this case was corroboration, or the lack of corroboration of the girl's testimony. Both trial counsel repeatedly emphasized to the Court and jury that the technical evidence did not corroborate the complainant's story that she was forcefully raped "four or five times." This factor was argued to the jury, both from the legal point

and on common sense that the necessary corroboration was lacking.

Yet, the Court invaded the province of the jury and pointed out which evidence could be accepted as meeting the legal requirement of corroboration. It is asserted that this instruction effectively supplemented the jury summation of the prosecutor, yet with the obvious emphasis that it came from the Judge.

Appellants do not contend that the Court told the jury how to decide this issue. The Judge's preliminary remark was as follows:

> ...but for clarification I wish to refer to some of the testimony which the jury may consider if it sees fit to do so, in the nature of corroboration (Tr. p. 762).

The summary which then followed clearly emphasized the views of the Trial Judge on this critical element; and, without any couter-balancing summary on behalf of the defense, may have been sufficient for conviction.

This Court's ruling in Sullivan v. United States, 85 U.S. App. D.C. 409, 178 F. 2d 723, is clearly pertinent to the instant case:

> The influence of the Trial Judge on the jury is of great weight, and his lightest word or intimation is received with deference and may prove controlling...that is especially so in a criminal trial. The damaging influence is more likely where conflicting evidence on a crucial issue leaves the outcome close, as it might have been in this case.[20]

A federal judge may of course comment on the evidence, but usually this is done by way of summary and the judge usually makes an

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20. 178 F. 2d. 725.

effort to summarize equally for both sides. Just how far the Court may go is not susceptible to strict rules. This Court stated in Vinci v. U.S., 81 U.S. App. D.C. 306, 159 F. 2d. 777, 778 (1947) that "the rule that a federal judge may comment on the evidence in a criminal case is not without limitation. The line has not been defined with precision and perhaps is not susceptible of such definition."

It is urged that the comment on the evidence in the instant case be viewed in that perspective; that the comment was on the crucial issue; that it gave emphasis without clarification; and, that the comment was highly prejudicial to the appellants.

IV

Did the Trial Court improperly exclude evidence proffered by the defense to impeach the testimony of the complaining witness by not admitting the police report of the complainant and by not permitting defense witnesses to testify to prior false reports made by the complaining witness?

At trial, defense counsel attempted to establish that the complaining witness had previously made a false accusation by claiming that another boy had had sexual relations with her. The complainant denied that she had ever made such a false accusation.[21]

The defense then called one Ernest Giles to the stand to impeach the testimony of the complainant. The proffer, as stated on page 479 of the transcript, was that Giles would testify that the complaining witness had previously told him that she had had sex relations with another boy. Derrol Johns was also present in Court and was prepared to deny that he had ever had sexual relations with the girl.

The proffer was made to impeach the veracity of the complaining witness by showing prior false statements.

In Howard v. United States, 108 U.S. App. D.C. 386, 278 F. 2d. 872 (1960) this Court reversed because the defense was denied the right to introduce a report into evidence to impeach the testimony of a Government witness. The Court ruled that "the fact that a witness made

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21. Transcript p. 145.

Q. Do you recall ever telling anyone that Darol Johns had had sexual relations with you?

A. No.

a prior inconsistent statement can be proved by other witnesses as well as by his own testimony." 278 F. 2d. at 873

Appellants do not contest the evidentiary rule that the complainant's chastity may not be used for impeachment in a carnal knowledge case. Appellants do contend that evidence that the complainant had previously claimed that another person had intercourse with her when that person was present in court to deny that assertion, was pertinent to impeach her credibility and to show a defect in her character.

Professor Wigmore advocates admitting evidence of prior unchaste character of the complainant, even when she is under the age of consent.[22] His reasons support the proffer here of a prior false accusation, which, incidentally, would have supported the girl's chastity and tended to show, not that she was unchaste, but that she had falsely claimed that she had previously engaged in sexual activities.

Wigmore states as follows:

> Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the Courts in all sorts of cases. There psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements, or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men. The unchaste(let us call it) mentality finds incidental but direct expression in the narration of imaginary sex-incidents of which the narrator is the heroine or the victim. On the surface,

22. 3 Wignore on evidence 924 (a) (1940 ed.).

> the narration is straight forward and convincing. The real victim, however, to often in such cases is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale.[23]

Wigmore continues with several case studies from eminent observers to support his thesis.

A recent California case permitted cross-examination of the complainant in a statutory rape charge as to whether or not she had made false charges of a similar nature against other men. People v. Hurlburt, 166 Cal. App. 2d 334, 333 P. 2d. 82 (1958).

Wigmore advocates admission of prior false claims. He states that

> It is time that the courts took warning here, and became more liberal. They know, and all know, that the court room has its quota of false claimants and pretended victims of wrong; ...it is hard enough, at last, to detect and expose them. To hamper this exposure with the shibboleth 'res inter alios acta' is impractical. And the injustice of the situation is often intensified by this maddening prohibition of the very evidence to which a common-sense tribunal would most quickly resort.[24]

The Court also excluded evidence offered by both defendants to impeach the testimony of the complainant. This was the police report, P.D. 251 offered at page 633-634 of the transcript.

Appellants urge that this Court rule that it was prejudicial error for the Trial Judge to exclude the testimony of prior false accusations of a similar nature to the complaint.

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23. Ibid.

24. Ibid. Sec. 964.

IV

Did the Court commit error in denying the defense motion for a directed verdict of acquittal at the close of the Government's case and at the close of all evidence?

Appellants contend that the Government's evidence, taken in its most favorable light, did not sustain guilt beyond a reasonable doubt and that defendants' motions at the conclusion of the Government's case should have been granted. There was "no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt."[25]

The motion for directed verdict of acquittal at the conclusion of the Government's case was argued commencing on page 373 of the transcript. The argument was predicated primarily upon the lack of corroboration, which went to the Government's entire case, excepting the identification of the defendants.

It is urged that the lack of corroboration of the sexual attack is a more restrained way of stating that the Government's evidence, taken in the most favorable light, would not sustain a verdict of guilt beyond a reasonable doubt.

When appellants argue that corroboration was lacking in that the Government did not introduce a medical report and the lab report was negative for semen and blood, appellants are forced into the position of arguing that medical evidence is required to corroborate the complainant in sustaining a conviction for rape. This, of course, is not the law.

25. Curley v. United States, 81 U.S. App. D.C. 389, 160 F. 2d. 229, 233.

Appellants argue quite simply that when this technical evidence is available and negates a sexual attack, then absent some other corroborating evidence, a directed verdict of acquittal must be entered. Or, when medical and other technical evidence does not sustain a reasonable hypothesis of guilt, then absent other competent evidence, the Government's case will not stand.

According to this Court, "...the ultimate effect to be accorded to "corroboration" can be achieved through the exercise by the Trial Judge of his power to direct a verdict of acquittal whenever the Government's case is inadequate, or to set aside a verdict when he is convinced it has been returned upon insufficient evidence." Walker v. United States, 223 F. 2d. 613, 617.

And Judge Bazelon stated in the dissenting opinion in Walker, supra at page 622, that "...the plain meaning of our corroboration rule in rape cases is that there must be an acquittal as a matter of law when, as here, the prosecution fails to produce the required direct or circumstantial corroborative evidence."

VI

Did the Trial Court commit prejudicial error by refusing to instruct the jury on the lesser included offense of simple assault?

The Trial Court indicated that she was going to instruct the jury on the lesser included offense of assault with intent to commit rape (Tr. p. 666-670). Defense counsel requested that the Court also instruct the jury on the lesser included offense of simple assault (Tr. p. 725-727). Defense counsel pointed out that there was testimony that the complaining witness was pulled down the steps and that this evidence, if believed, would support a verdict of guilty of simple assault.[25] The Court declined to so instruct.

It is urged that the jury could have accepted the Government's evidence that the girl was pulled down the steps, but rejected the evidence that she was sexually assaulted, particularly in view of the testimony of the Government witness, Andrew Ford, who stated that he was present and that the defendants did not touch the girl in the laundry room (Tr. p. 257-260). The jury could also accepted the medical evidence which did not show penetration and the F.B.I. lab report which disclosed no traces of semen or blood on the clothes. Under this theory of the case, the only proper verdict would have been simple assault - yet this choice was foreclosed to the jury.

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25. Transcript page 726.

In Young v. United States, 114 U.S. App. D.C. 42, 309 F. 2d. 662, (1962), the defendant was convicted of assault with intent to commit robbery. This Court reversed and remanded for the stated reason that the evidence would support a verdict of simple assault and the trial court had refused to so instruct.

In Young a companion had testified that the defendant was searching the victim's pockets for weapons and "however implausible, unreliable or incredible only the jury had the right to make the evaluation of West's (the companion's) testimony."[26/]

In the instant case, the evidence supporting simple assault was not nearly so "implausible, unreliable or incredible", but was supported by a Government witness, the medical report and the Federal Bureau of Investigation - three sources, which are generally considered reliable, plausible and credible.

The Federal Rules of Criminal Procedure provides that "the defendant may be found guilty of an offense necessarily included in the offense charged..."[27/]

Clearly, simple assault is necessarily included in the offense of carnal knowledge - yet the appellants could not have been convicted as this offense was not submitted to the jury.

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26. 309 F. 2d. at 663.

27. Rule 31(c), Federal Rules of Criminal Procedure.

In Graves v. United States, 115 U.S. App. D.C. 294, 318 F. 2d. 265 (1963) the Circuit Court reversed upon a confession of error by the Government that the Trial Court should have instructed on the lesser included offense of larceny in a robbery conviction. The Court relied principally upon Young, supra. and Hunt, infa.

In Hunt v. United States, 115 U.S. App. D.C. , 316 F. 2d. 652 (1963) the Trial Court did submit the case to the jury on the lesser included offense of larceny, but the Court ruled that there was insufficient evidence to submit the greater offense of robbery to the jury and reversed.

In Williams v. United States, 116 U.S. App. D.C. 132, 321 F. 2d. 744 (1963) this Court affirmed a robbery conviction, but stated in foot note 2 of the opinion that if the lesser included offense of attempted robbery had been requested, its denial would have been reversible error. Citing Young v. United States, supra.

It is therefore submitted that the jury could have reasonably concluded that the evidence did support the charge of simple assault, "(B)ut without the critical instruction they would not be afforded the choice which was exclusively a jury choice."[28/]

The request for this instruction was denied and counsel asserts that this was prejudicial error.

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28. Young v. United States, 309 F. 2d at 663.

VII

Did the Trial Court deny appellants due process of law in her denial of a Motion for a New Trial based on material discrepancies in the testimony of the complaining witness and her mother at a subsequent trial relating to the same offense for which the appellants were convicted?

When the appellants were sentenced on August 25, 1967, trial counsel filed a written motion requesting that the Court postpone sentencing to permit counsel to obtain the transcript of a Juvenile Court proceeding concerning the same offense in which two key witnesses changed their testimony in material matters. Counsel also requested leave of court to obtain the transcript at Government expense.

The Trial Court refused to postpone sentencing, but authorized counsel to obtain the transcript at Government expense, provided the Juvenile Court consented.

Transcript of the Juvenile Court proceeding was obtained on November 3, 1967 and a Motion for a New Trial Based on Newly Discovered Evidence was filed. This motion was denied without hearing on December 27, 1967 and an appeal from that denial has been noted in this Court.

The trial in Juvenile Court involved one Larry Bailey for the same offense on the same date and place as the conviction herein. The trial was conducted on August 15, 16 and 17, 1967 before Judge Ketchum sitting without a jury. The Government's case consisted of the same evidence as the District Court case, with the one exception that a different

police officer testified. Otherwise, the Government's witnesses were the same.

In the Juvenile Court, Judge Ketchum, sitting without a jury, ruled that "...the complainant's testimony is not reliable...there is no corroboration to the fact that she ever had sexual intercourse on this occasion...that there is no evidence that any sexual intercourse took place in the laundry room. And finally, that neither one, three or four acts occurred in the laundry room. On this set of facts, the Court finds that the respondant is not...not guilty of the acts alleged."[29]

This ruling by Judge Ketchum was based on serious and material discrepancies in the testimony of the complaining witness and her mother at Larry Bailey's trial before the Juvenile Court, that trial being subsequent to the trial of the appellants herein. Counsel asserts that these discrepancies are so clear and so material that a new trial should have been granted in the interest of justice.

A preliminary issue which must be discussed is whether subsequent sworn testimony by a key witness constitutes newly discovered evidence upon which a motion for a new trial should be granted.

In Mesarosh v. United States, 352 U.S. 1, 1 L. Ed. 2d. 1 (1956), the Government requested the Supreme Court to remand the case to the Trial Court to determine the propriety of granting a new trial in view

29. Page 64-65, Transcript of the Juvenile Court proceeding. This Transcript was filed in the District Court as an exhibit to the Motion for a New Trial and has been transmitted to this Court as part of the record on appeal from the denial of the motion below.

of evidence that a witness for the Government at the time had given untruthful testimony, similar in nature, in subsequent proceedings. The Supreme Court denied the motion of the Government, reversed the conviction and ordered a new trial in that the Solicitor General's motion to remand indicated the unreliability of the witness' testimony at trial. Chief Justice Warren, writing for the majority stated as follows:

> Either this court or the District Court should accept the statements of the Solicitor General as indicating the unreliability of the Government witness. The question of whether his untruthfulness in these other proceedings constituted perjury or was caused by a psychiatric condition can make no material difference here. Which ever explanation might be found to be correct in this regard Mazzei's (the witness) credibility has been wholly discredited by the disclosures of the Solicitor General. No other conclusion is possible. The dignity of the U.S. Government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other just result then to accord petitioner a new trial. (emphasis supplied).[30]

Mazzei was one of seven Government witnesses. The witnesses in the instant case are the complaining witness and her mother - the two crucial witnesses, without which there would not have been a case for the Government.

Other courts have struggled with this question, but usually in the context of a recantation obtained in the form of an affidavit from a Government witness. No other case has been located in which discrepancies arose in the testimony of the complainant in a subsequent trial

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30. 352 U.S. 9

Nevertheless, some rules have evolved from the recantation situation which can be applied here.

The Seventh Circuit ruled in Larrison v. United States, 24 F. 2d. 82 (Seventh Cir. 1928) that the following guidelines should apply:

> We shall approach this question on the assumption that a new trial should be granted when,
>
> (a) the Court is reasonably well satisfied that the testimony given by a material witness is false.
>
> (b) that without it the jury might have reached a different conclusion. (emphasis in original)
>
> (c) that the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know its falsity until after the trial.

Judge Dimock of the Southern District of New York followed the Larrison Rule in granting new trials for two of thirteen convicted defendants after it was established that the well known perjurer, Harvey Matusow, had lied at their trial.[31/]

These guidelines were adopted in an expanded version by this Court in Thompson v. United States, 89 U.S. App. D.C. 293, 188 F. 2d. 652 (1951). In that case, the newly discovered evidence consisted entirely of a police record of the complaining witness showing convictions for petit larceny and arrests for drunkeness. The District Court's denial of a new trial was affirmed, but the Court set forth

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31. United States v. Flynn, 131 F. Supp. 742 (S.D.N.Y. 1955)

the following rules.

> To obtain a new trial because of the newly discovered evidence (1) the evidence must have been discovered since the trial; (2) the party seeking the new trial must show diligence in the attempt to procure the newly discovered evidence; (3) the evidence relied on must not be merely cumulative or impeaching; (4) it must be material to the issues involved; and, (5) of such nature that in a new trial it would probably produce an acquittal.

In the instant case, the evidence was not discovered until August. Diligence was shown in that at the time of sentence, counsel requested a stay of sentencing and authority to obtain a transcript from the Juvenile Court. This transcript was not received until November 3, 1967. The conflicting testimony is not cumulative or impeaching, but goes to crucial allegations in the complaint and its materiality speaks for itself. And, finally, the testimony did in fact produce an acquittal in the subsequent trial. Thus, all of the text is set forth by this Circuit in Thompson, supra. are met here.

In the District Court trial, a crucial factor was the complainant's concern with using a telephone to call her mother. This was her asserted reason for leaving the home of Fay Cannon and accompanying the defendants to 76 Forrester Street. The girl testified that she could not telephone from the Cannon home because the phone was in use.[32]

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32. At page 130 of the District Court transcript, the complainant testified that she did not use the Cannon phone because it was in use at the time. She reiterated this testimony at page 152 of the District Court transcript.

In the Juvenile Court, the complainant testified that she didn't call from the Cannon home because they didn't have a telephone.[33/]

In the District Court trial, the complainant testified that during the alleged attack, one of the boys held a hand over her mouth, and further, that she did not scream while she was in the basement laundry room (District Court transcript, page 80).[34/]

In the Juvenile Court, the girl testified that she screamed several times while she was in the basement.[35/] She further testified that no one put a hand over her mouth.[36/]

In the Juvenile Court trial, Vivian Robinson testified that Larry Bailey grabbed her by the neck and dragged her down into the basement.[37/] In the District Court, she testified only that Larry Bailey "pulled her in the basement."[38/]

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33. Juvenile Court transcript, page 5:
    Q. When was the first time you attempted to call your mother that day?
    A. At Faye's house.
    Q. And why didn't you call your mother there?
    A. Because Faye didn't have a phone.
    Q. She didn't have one or you couldn't
    A. She didn't have a phone.

34. This testimony was iterated at page 157 and 159 of the transcript in District Court.

35. Juvenile Court transcript page 28.

36. Juvenile Court transcript page 31 and page 33. See also the puzzling contradiction on page 34.

37. Juvenile Court transcript page 18.

38. District Court transcript page 169.

The underpants worn by the complaining witness at the time of the alleged attack were of particular significance as Vivian Robinson testified that they were never completely removed, that she wore them home, then to the hospital and gave them to the police officer. The mother of the girl confirmed that these same pants were worn when her daughter arrived home and were given to the police at the hospital.

In the Juvenile Court, the mother completely changed her testimony and stated that her daughter changed pants at home.

These underpants were crucial and would have been mute but eloquent corroboration that a sexual attack had in fact occurred. For the mother to suddenly remember two months after the District Court trial that this crucial evidence was not the same as worn during the alleged attack and during her examination is incredulous.

It is asserted that this was a marked flaw in the Government's case, in that the pants negated any sexual attack. Therefore, the mother sought to correct this flaw in the Juvenile trial and was pinioned by a scathing cross-examination, clearly apparent to the Juvenile Court at page 52 of that transcript.

The contrast in the two transcripts is startling. At page 285 in the District Court, the mother testified that the daughter had on the same pants at home. At page 290, she testified that the daughter wore the same pants to the hospital and there turned them over to the police. The daughter corroborated this chain of possession of her undergarment on page 87, 91 and 142 of the District Court transcript.

This Court's attention is respectfully invited to the testimony commencing on page 40 of the transcript in the Juvenile Court, wherein, Mrs. Robinson testified that her daughter removed her underpants at home, that she threw them in the hamper, and that she put on clean pants when she went to the hospital.[39/]

It is urged that each of these discrepancies are material and that any one should have been sufficient for a new trial.

The testimony concerning the use of the telephone was significant, as it was the sole asserted reason for the visit to 76 Forrester Street where the attack allegedly occurred.

The underpants which the complainant claimed were worn throughout the entire attack were of the utmost importance. Were these the pants which were given to the police and to the F.B.I.; or, were they changed at home?

Did the girl scream several times in the basement; or, did someone place a hand over her mouth? These questions go to the heart of the entire matter and unless tested by cross-examination, the convictions should not be permitted to stand.

WHEREFORE, for each of the reasons stated, it is respectfully asserted that these convictions should be reversed.

39. See also page 44 and page 48 of the Juvenile Court transcript.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21, 297
No. 21, 585

JAMES BAILEY,

Appellant

V.

UNITED STATES OF AMERICA,

Appellee

No. 21, 298
No. 21, 586

RONALD HUMPHRIES,

Appellant

V.

UNITED STATES OF AMERICA,

Appellee

SUPPLEMENTAL BRIEF FOR APPELLANTS

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 22 1968

Nathan J. Paulson
CLERK

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Attorney for Appellants
Appointed by this Court

I. The District of Columbia Code does not permit imposition of the death penalty upon conviction of carnal knowledge; and, therefore, death qualification of the jury panel and submission to the jury of the question of capital punishment was error.

The appellants herein were charged with carnal knowledge in a one-count indictment.[1] This is a violation of D.C. Code, Title 22, Sec. 2801 (1967 Ed.) which states:

> Whoever has carnal knowledge of a woman forceably and against her will, or carnally knows and abuses a female child under sixteen years of age, shall be imprisoned for not more than thirty years: provided, that in any case of rape the jury may add to their verdict, if it be guilty, the words "with the death penalty..."

The trial court instructed the jury that carnal knowledge means "...sexual intercourse with a female child under 16 years of age."[2]

The Court below then instructed the jury that if the defendants were found guilty of carnal knowledge, "...it may add to the verdict the words 'with the death penalty'."[3]

1/ The indictment reads:

"On or about March 27, 1966, within the District of Columbia James Bailey and Ronald Humphries carnally knew and abused a female child named Vivian E. Robinson, who was then under sixteen years of age, that is to say, about fifteen years of age."

2/ Transcript, page 759-760.
The Court continued, at page 760:

"Having sexual intercourse with a female under sixteen years of age is a crime, and that is true whether she does or does not consent, whether force was or was not used, and whether the act was or was not against her will. The law says that the female under 16 years of age is under the age of consent and that she could not consent to sexual intercourse."

3/ Transcript, page 771-772.

Appellants contend that this was prejudicial error in that the statute does not permit imposition of the death penalty upon a carnal knowledge conviction. This is particularly significant since trial counsel attempted to keep the issue of the death penalty out of the trial prior to voir dire.[4/]

A plain reading of the statute indicates that only rape calls for the death penalty. Otherwise, the limiting phrase "provided that" would not have been necessary. The wording of the statute would indicate that Congress intended to impose a more severe penalty for the crime of rape, which includes the element of force.

Unfortunately, there is no legislative history available to assist court or counsel in determing the congressional intent behind the statute. Only one case has discussed the question and that by way of dictum in Sanselo v. United States, 44 Ap. D.C. 508 (1916). There the appellant was sentenced to ten years upon a finding of guilty of assault with intent to commit carnal knowledge. The opinion of the Court equated rape with carnal knowledge. This, it is asserted, was erroneous and it is further asserted that the courts in this jurisdiction have been compounding this error for the ensuing fifty-two years since Sanselo.

In the instant case, the trial court, in denying the defense request that the veniremen not be qualified as to the death

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4 / See transcript page 7 and question I in Brief for Appellants.

penalty stated:

> The Court: Despite the fact the United States Attorney is not asking for the death penalty, the law says that the jury may recommend that. So I don't think what Mr. Nunzio wants to do can change the law. I just completed a rape case where the government didn't say anything about the death penalty but I told the jury the law in my instructions because I felt I had to.[5]

It must be pointed out, that defense counsel did not add to the confusion in that he agreed with the Court that "the statute does provide for it (the death penalty)," but, he persisted in his effort to remove the issue from the trial.[6]

It is also respectfully pointed out that this Court has confused the terms "rape" and "carnal knowledge". In Tatum v. United States, 88 U.S. Ap. D.C. 386, 190 F. 2d. 612 (1951), the Court used the term "rape", yet the appellant was indicted upon a charge of carnal knowledge.[7]

In order to rule that the D.C. Code does not permit imposition of the death penalty for carnal knowledge, the Court must make a clear distinction between rape and carnal knowledge. It is asserted that the proviso in the code provision means that death may be imposed only in cases of rape and that the maximum penalty for conviction of carnal knowledge is imprisonment for thirty years.

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5 / Transcript, page 7.

6 / Transcript, page 8.

7 / The indictment in Tatum reads that he "carnally knew and abused a female child...who was then under 16 years of age, that is to say, about 9 years of age."

Rape has traditionally been synonymous with force. The word derives from the Latin rapere which is to seize with violence.[8] Rape is "carnal knowledge of a woman by a man forcibly and unlawfully against her will."[9]

Carnal knowledge is sexual intercourse - or, sexual penetration without the element of force. "Carnal knowledge is synonymous with sexual intercourse;"[10] or, "implies sexual intercourse;"[11] and, "as used in rape statute is synonymous with sexual intercourse."[12]

In State v. Siebke, 216 Minn. 181, 12 N.W. 2d. 186, 189 (1943) it was held "that under our statute and our decision law, the crime of carnal knowledge is a separate and distinct offense from that of rape."

In State v. Hummer, 73 N.J.L. 714, 65 A. 249 (1906), the Court drew careful distinctions between carnal knowledge, carnal abuse and rape. Appellant contended that abuse was identical with rape and therefore incomplete without penetration. The Court

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8 / Bouvier Legal Dictionary.

9 / Ibid.

10 / Nobel v. State, 22 Ohio St. 541, 545; People v. Burke, 400 Ill. 240, 79 N.E. 2d. 488.

11 / State v. Whalen, 98 Iowa 662, 68 N.W. 554, 555.

12 / State v. Croteau, 158 Me. 360, 184 A. 2d. 683, 684.

ruled that "know" means penetration, whereas "abuse" describes an assault on the female genitalia, citing the biblical reference that "Adam knew Eve."[13/]

In King v. Commonwealth, 165 Va. 843, 183 S.E. 187, 189 (1936), it was held that "to constitute rape other than statutory rape, there must be unlawful, carnal knowledge by a man of a woman, forcibly and against her will...carnal knowledge means sexual intercourse and is complete upon proof of penetration of the female organ by the male organ, however slight."

Blackstone also separates the offenses. He defines rape, raptus muherum, as "carnal knowledge of a woman forcibly and against her will", which, as he points out, under Jewish law was punished by death, if the damsel were betrothed to another man.[14/]

Blackstone continues with an interesting comparison of the various punishments for rape and carnal knowledge, which invariably was more severe for the former. Rape, under William the Conqueror was punishable by castration and loss of eyes. Under the statutes of Edward I ravishing a female under twelve was made a misdemeanor, i.e., not a capital offense. Then, by the statute, 18 Elizabeth, Ch. 7, rape was

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13/ "And Adam knew Eve his wife; and she conceived, and bare Cain, and said I have gotten a man from the Lord." Genesis, Ch. 4 v. 1, King James Version.

14/ Blackstone's Commentaries, Book IV, page 210.

a felony without benefit of clergy, which was the same for "knowing and abusing" any woman child under the age of ten.[15/]

Under George IV, rape was a felony punishable by death, whereas to carnally know and abuse a female between the age of ten and twelve was a misdemeanor.

Would the unavailable legislative history of 22-2801 reveal the same common law derivation of the terms "carnally knows and abuses a female child" as cited by Blackstone? If so, then there should be a similar derivation of punishment, the graver being reserved for the forcible crime of rape.

Rape and carnal knowledge are two different crimes by definition; therefore, the proviso in the D.C. Code which permits the death penalty upon conviction of rape means just that and no more. If Congress intended that death be imposed for conviction of carnal knowledge, the statute would so state.

It is asserted that our courts, as well as defense counsel and prosecutors have been too long confused by the terms rape and carnal knowledge. The words, the crimes, and the punishment can be clearly defined by this Court.

15/ Ibid.

II. The penalty provision of the District of Columbia rape statute is unconstitutional under the ruling of United States v. Charles Jackson, decided by the Supreme Court on April 8, 1968.

The section of the D.C. Code under which these appellants were convicted states, in pertinent part:

> Provided, that in any case of rape the jury may add to their verdict, if it be guilty, the words 'with the death penalty'. . . [16]

That portion of the Federal Kidnaping Act, which was ruled unconstitutional in United States v. Jackson, supra, states that the defendant

> . . . shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, . . . [17]

It is asserted that the District of Columbia statute contains the precise element which caused the penalty provision in the Federal Kidnaping Act to be invalidated by the Supreme Court. The Court stated that the problem was ". . . to decide whether the Constitution permits the establishment of such a death penalty, applicable only to those defendants who assert the right to contest their guilt before a jury." [18]

Here, the appellants elected to risk the death penalty by exercising their constitutional right to a jury trial. They were assured that the government was not requesting the death penalty; however, the jury was death qualified and carefully

16/ D.C. Code, Title 22-2801 (1967 Ed.).

17/ 18 U.S.C. 1201(a).

18/ Ibid, slip opinion, page 11.

instructed that it could impose that penalty. The appellants were thereby penalized as opposed to those defendants who waive their right to a jury trial and plead guilty in order to avoid the death penalty. Accordingly, the Supreme Court ruled in Jackson, "...whatever the power of Congress to impose a death penalty for violators of the Federal Kidnaping Act, Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right."[19/]

This question was raised before this circuit in Lindsay v. United States, 77 U.S. App. D.C. 1, 133 F. 2d. 368 (1942) wherein it was contended that the proviso in the D.C. rape statute deprived the appellant of his right to a jury trial. Justice Stephens of this Court was admittedly perplexed and asked that the question be certified to the Supreme Court for instructions. The other members of the panel did not agree.

The Supreme Court has now ruled, clearly and unequivocally, on this question and it is respectfully asserted that this Court should follow the law as set forth in United States v. Jackson and hold that the penalty provision in the District of Columbia rape statute is unconstitutional.

19/ United States v. Jackson, supra, slip opinion, page 13.

Respectfully submitted,

J. Gordon Forester, Jr.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 21,297, 21,585

JAMES BAILEY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Nos. 21,298, 21,586

RONALD HUMPHRIES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit
FILED APR 8 1968
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Cr. No. 612-66

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1) Were appellants denied due process of law or a trial by an impartial jury when seven prospective jurors were questioned as to their belief in capital punishment and six such jurors who indicated both that they were opposed to capital punishment and that they could not return the death penalty though the others agreed that it was warranted and could exercise their choice to do so as allowed under 28 D.C. Code § 2801 were excused?

2) What is the proper standard for corroboration in a carnal knowledge case? Was there sufficient evidence of corroboration to withstand motions for judgment of acquittal made at the end of the government's case and at the conclusion of all the evidence?

3) Did the trial judge commit error by accurately referring to the government's evidence of corroboration in explaining to the jury the meaning of that term, and if so did the error prejudice appellants?

4) Did the trial court abuse her discretion by refusing to allow a defense witness to state that the prosecutrix told him that she had had sexual relations with another defense witness, and that latter witness to testify that this had not occurred, where the prosecutrix denied on cross-examination that she had had intercourse with the latter, and did not recall having a conversation with the former on that subject?

5) Did the trial judge err in refusing to instruct on simple assault in a carnal knowledge case, and if so was it this prejudicial error, especially where she instructed the jury on the lesser included offense of assault with intent to commit carnal knowledge?

6) Did the trial judge abuse her discretion in denying a new trial based on newly discovered evidence allegedly arising out of a subsequent Juvenile Court trial of another party involved in the same transaction?

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United States Court of Appeals

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JAMES BAILEY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Nos. 21,298, 21,586

RONALD HUMPHRIES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed May 9, 1966, appellants Bailey and Humphries were charged with having carnally known and abused one Vivian Robinson, who was then under

sixteen years of age, in violation of 22 D.C. Code § 2801. On May 20, 1966, both appellants pled not guilty to the charges. After trial before Judge Matthews, the jury returned a verdict on June 20, 1967 of guilty as charged as to both appellants. On August 17, 1967 Larry Bailey, the younger brother of appellant here and allegedly a participant in the offense, was found not guilty by Judge Ketchum in the Juvenile Court. On August 25, 1967 appellants moved to postpone sentencing and to obtain a transcript of the Juvenile Court proceedings at government expense. This motion was granted as to the latter request and denied as to the former. When the transcript became available it was filed in District Court with appellants' motion for a new trial on November 14, 1967. By order of January 2, 1968, Judge Matthews denied the motion for new trial, saying "and it appearing to the Court that the defendants were convicted of carnal knowledge after a jury trial, and that an appeal from that conviction is pending, and it further appearing to the Court that the defendants have failed to show any newly discovered evidence which is of such a character as would probably lead to a different verdict . . . [the motion] . . . is denied." These appeals followed.[1]

I. The Voir Dire

At a bench conference counsel for appellants stated that in a letter written in April, 1967, they had asked the Assistant United States Attorney to advise them whether the death penalty would be asked for in this case (Tr. 7). Apparently they had received no response to the letter, but the Assistant United States Attorney indicated at the bench conference that the government was not asking for the death penalty (Tr. 7). Counsel then asked the trial judge to rule that it would be improper for the prosecutor to qualify the jurors as to the death penalty (Tr. 7). The trial judge noted that the statute

[1] By order of January 24, 1968 C.A. Nos. 21,585 and 21,586 (appeals from the denial of the motion for a new trial) were consolidated with C.A. Nos. 21,297 and 21,298 (the original appeals).

provided that the jury could recommend the death penalty and denied the request (Tr. 7-8).

The prosecutor asked any members of the prospective jury panel that were opposed to capital punishment to stand (Tr. 22). Seven did (Tr. 22-27). Juror Reeves was asked by the prosecutor if she was opposed to capital punishment and answered that she was (Tr. 22-23). He then asked her whether "[w]ith this feeling toward capital punishment" she could "return the death penalty". She said she could not. The trial judge, after telling the jury the effect of the statutory provision and pointing out that no rape case called for the death penalty unless the jury concluded to unanimously recommend the death penalty, asked her if she took the position that she could not consider the death penalty even though the verdict was guilty. She received an affirmative reply. (Tr. 23). The trial judge then asked juror Lee the same question with the same result (Tr. 23-24). Defense counsel then asked Mr. Lee whether, if he was on the jury, "the facts presented to you were so aggravated and so horrendous that the rest of your associates sitting on that jury felt that a death penalty was justified . . . you would still be unable to arrive at a verdict calling for the death penalty". Juror Lee replied that that was correct (Tr. 24).

The trial judge then asked juror Botko whether "if the jury determines that the verdict should be guilty and that it should be with the death penalty you still feel that you would not be able to go along with it?" (Tr. 24). She said that was correct. Defense counsel then asked her if that was a firm moral conviction on her part and she replied "Yes, that is right. I just don't believe in the death penalty" (Tr. 25). A similar question was put by the trial judge to Juror Willis, and she replied affirmatively. Defense counsel asked this juror no questions, and she was excused (Tr. 25-26). Juror Zeydel was asked by the court if her feelings about capital punishment were "such that you would be unable to consider the death penalty in any case". She said that was correct, and defense

counsel then asked her if she would still be unable to vote for the death penalty even if the facts were aggravated and all the other jurors felt that the death penalty was called for, and whether her view reflected a strong moral conviction. The juror's responses to both questions were affirmative (Tr. 26).

The trial judge asked juror Donovan if she felt that she "could not consider this addition to the guilty verdict in case the jury should arrive at one". She said that was right. Defense counsel said he had no questions (Tr. 27). Juror Smith was asked by the trial judge what her feeling was. She replied, "I don't believe in capital punishment". The trial judge then asked her if she felt that "there is no case in which you could go along with a recommendation of the death penalty" and she replied that that was right (Tr. 27). Juror Kretzmer was asked by the trial judge if she would like to state what her views were. She said "I don't believe in capital punishment but I would go along with the rest of the jury if they saw fit to do so" (Tr. 28). She reaffirmed this statement when defense counsel asked her if she could agree to the death penalty if the facts were aggravated and the rest of the jury was unanimous. She was then asked by the court to be seated (Tr. 29).

Voir dire continued. Defense counsel said that he had one final question:

> Please think very carefully on this question because this is an important case. Can any of you think of any reason why you cannot fairly and impartially sit as a juror in this case and judge the facts on the basis of the testimony and the evidence presented to you, and on the basis of those facts alone reach a fair and impartial verdict? (Tr. 34).

Each of the aforementioned prospective jurors was excused by the court, except for prospective Juror Kretzmer. She did not serve (Tr. 37).

II. The Trial

A. The Government's Case

1. *Miss Robinson's testimony*

Miss Vivian Robinson, who was fifteen years old when the acts charged took place, was the government's first witness. Her testimony was as follows: She was taken by her mother to the home of a girlfriend, Diane Bailey, about 3:30 p.m. on May 27, 1966 (Tr. 49-50). Her mother left her there and went home (Tr. 52). There, while playing records in the basement, she met for the first time Andrew Ford, Ronald Humphries, and Diane's brothers Larry and James Bailey (Tr. 50-52). Later, Faye Cannon and her brother Larry came (Tr. 53, 117). She left with Faye and walked to her house to ask her mother if Faye could walk her home (Tr. 54). James Bailey and Larry Cannon were there (Tr. 55, 121).

She left there with James Bailey (Tr. 55, 57). He had asked if he could walk her home. After some hesitation, she said he could because he was Diane's brother (Tr. 57-58, 123). However, he said that he had forgotten his wallet, and asked her to walk with him to his home to get it first (Tr. 57-58, 123, 126). When they got there, he couldn't get in (Tr. 59, 126). He left her there, apparently in the back yard, telling her to wait (Tr. 59-60, 127). Larry Bailey, Ronald Humphries, and Andrew Ford arrived just before James returned (Tr. 60-61).

She told James that she had to call her mother and he replied that she could call from "this boy's house" (Tr. 61).[2] Then they all walked to the place from which he said she could make a phone call, 76 Forrester Street, S.E. (Tr. 62, 63).[3] When they got to the apartment building,

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[2] On cross-examination, she said "Only thing James told me that he had a friend, he knew a friend that I could call my mother from" (Tr. 156).

[3] She said "[i]t was sort of dark" by this time (Tr. 62). She walked with James and the others were close behind them (Tr. 62, 133).

James started into the basement. Miss Robinson refused to follow, telling him that she wasn't going down there (Tr. 63). She turned to run, but Larry Bailey grabbed her and pulled her down the stairs and into the laundry room (Tr. 64, 66, 135, 170).[4] James Bailey, Ronald Humphries, and Andrew Ford also came into the laundry room.[5] James jumped up on a machine and removed a bulb from the light. (Tr. 67). She was then thrown to the cement floor (Tr. 68, 156). Her pants were pulled down but not completely off and her dress was pulled up (Tr. 69, 142, 161). She testified that "they, all of them, rushed at me and had relations with me"; that "four of them had intercourse" with her and that all four of them put their penises into her vagina (Tr. 68, 75, 78). During this period the boys were laughing and giggling (Tr. 135, 166). She told James that she wanted to go home but he told her to shut up (Tr. 79, 166-68).[6]

Mrs. Johnson, unknown to the prosecutrix before that night, pushed the door to the laundry room open (Tr. 82). The boys "all jumped and ran" out of the laundry room and thence out of the back door (Tr. 83, 136, 137-38). The prosecutrix "went and caught Mrs. Johnson . . . [a]s she was going up the stairway" (Tr. 83, 139, 158). She told her that she had been raped and asked if she had a phone she could use to call her mother (Tr. 84). She was crying and upset at the time (Tr. 84, 158, 171). Mrs. Johnson took her to the apartment of Mr. Lewis, the resident manager, where she told him the same thing (Tr. 89). She used his phone to call her mother, and told her what happened when she got there about 15 minutes after the call was placed (Tr. 90, 143).

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[4] The record is unclear as to who pulled her into the laundry room. While she testified that Larry did it, she also testified that "they" pulled her into the laundry room (Tr. 65).

[5] She saw their faces before the light went out (Tr. 168, 169).

[6] She tesified that someone was holding her hands and legs, and that someone put his hand over her mouth, but "not all the time" (Tr. 80-82, 160-61).

Her mother then took her home and examined her. She said that she wore the clothes she had on to the hospital, where she changed and gave the ones she took off to the police (Tr. 92, 111, 14-42).[7]

2. *Aaron Wright's testimony*

Aaron Wright testified that he saw Miss Robinson in the basement of the Bailey home on March 27, 1966 (Tr. 180, 182). He left there with James Bailey, Ronald Humphries, Andrew Ford and Larry Bailey (Tr. 182-83). He and Larry Cannon went to a carry-out shop (Tr. 183). When he next saw Miss Robinson she was walking with Larry Bailey, James Bailey, Andrew Ford and Ronald Humphries toward Forrester Street (Tr. 187-88, 189). The boys were walking in a group, "about a step" behind her (Tr. 188). They went into 76 Forrester Street (Tr. 190-91). He and Larry Cannon followed along, but did not go inside (Tr. 192, 193). About ten minutes later, he saw the four boys, one of whom said that they were going to get some coffee (Tr. 192).

3. *Mrs. Johnson's testimony*

Mrs. Johnson lived at 76 Forrester Street (Tr. 204). On March 27, 1966, about 6:30 p.m., she went down into

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[7] On cross-examination, the prosecutrix was asked if she recalled having a conversation with one Ernest Giles in which she stated that she had had sexual relations with one Derrol Johns. She said she had never had sexual relations with Derrol Johns; that she did not recall having talked to Ernest Giles and that she did not recall telling him anything like that (Tr. 145). She testified that her girlfriend knew both boys, but that she did not know them well (Tr. 130).

Later, she testified that she had not talked to Giles after the incident; that she did not know him personally; and that one of her girlfriends had showed him to her. She said she had been introduced to Derrol Johns by that girlfriend (Linda Braddock), but had not dated him; nor did she have any steady boyfriends at the time (Tr. 172-73).

She also denied stopping under the steps leading into the basement with Andrew Ford or entering the building with him, or having a conversation with him before entering the laundry room. She said that he did not put his hand on her shortly before she entered the building (Tr. 158).

the basement to get her laundry. She heard laughing and talking, but no female voices. She opened the door to the laundry room and tried the lights, but they would not work, so she turned around and started back upstairs (Tr. 206, 217). When she got about halfway up the steps she heard noise and turned around to see "all the boys" run out of the laundry room and then out of the back door (Tr. 207, 209, 220). Later on "a girl came up the steps behind [her], crying" (Tr. 207). She later identified Miss Robinson as the girl (Tr. 213). Mrs. Johnson reiterated that she was crying "and her head was down like that, something like that" (Tr. 212). She told her that she had been raped and asked if she could use her telephone (Tr. 207, 212). Mrs. Johnson testified that the lights were "always on" in the laundry room, and that the door was normally kept open (Tr. 216, 223). Mrs. Johnson took the prosecutrix to the apartment of Mr. Lewis, the resident manager, to use his phone (Tr. 207, 222).

4. *Mr. Lewis' testimony*

This witness was the resident manager at 76 Forrester Street (Tr. 225). He said that on March 27, 1966 Mrs. Johnson brought Miss Robinson into his apartment and asked if she could use the telephone (Tr. 226). The prosecutrix was "crying and wringing her hands like that" (Tr. 229). He thought she "had a little dirt on her dress like, like a little dust" (Tr. 230). He testified that "[s]he said that somebody carried her down there and raped her in the laundry room" (Tr. 230).

Mr. Lewis went downstairs with a flashlight. The lights were out, including the lights in the hallway, and someone had unscrewed the fluorescent bulb and put it on the washing machine (Tr. 226, 227, 228, 229, 235, 237). He left everything like it was and locked the door until the police came (Tr. 227).

5. *Andrew Ford's testimony*

Andrew Ford was a close friend of both appellants. He began his testimony by saying that while in the basement at 76 Forrester Street, in the company of James Bailey, Ronald Humphries and Larry Bailey, he had sexual relations with Vivian Robinson (Tr. 240-241). He testified that this occurred under steps which lead to the laundry room, and that when he finished, the other boys were standing around (Tr. 242).[8] According to him, Miss Robinson then voluntarily went into the laundry room with them (Tr. 243, 255-58). He was the last one into the room and when he entered the lights were off (Tr. 244, 258). There was laughing and giggling in the laundry room (Tr. 256). He did not see or hear anyone have sexual relations with Miss Robinson (Tr. 247, 257). When Mrs. Johnson came to the door, everyone hid behind the washing machines. He said the prosecutrix hid behind the same one he did; that he pushed her away but he didn't know why; and that there was enough room behind the washing machine for both of them to hide (Tr. 258-59).

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[8] He admitted that he was at the National Training School because he had admitted in Juvenile Court that he had sexual relations with Vivian Robinson (Tr. 266, 267; see also J. Ct. Tr. 63, 65). He denied that he had during his testimony (Tr. 245, 253-55, 267). He testified that he was on her; that he was trying to have sexual relations with her without having a hard penis; that he couldn't do it because he had been circumcised; and that his penis may have been near her vaginal area and later that he put his penis up to her vaginal area but did not attempt to push it in (Tr. 245, 251, 253, 262, 278). The witness was circumcised on March 5. The bandages were taken off on March 18. No treatments were being given at that time (Tr. 254, 426, 427). He testified that the stitches had "kind of dissolved" (Tr. 265). The record of Ford's visit to the hospital on the 18th stated "Patient coming for circumcision three weeks-'sulvi tem' healed. Scab over area near fremular area" (Tr. 427). He testified that he was positive that Miss Robinson had no pants on "[b]ecause he] didn't feel no pants" (Tr. 264, 274). He remembered talking to the prosecutor in the presence of Officers DeMilt and Harrel. But when the prosecutor asked if he remembered "telling me that you came on and after you had finished you zipped yourself up?", he answered "I didn't say I came on . . ." (Tr. 266).

6. *Mrs. Robinson's testimony*

The prosecutrix's mother testified that she took her daughter to the Bailey home that Sunday after Diane Bailey had called and asked her if Vivian could come to visit (Tr. 282). She left, and the next time she heard from Vivian was when another of her daughters told her that Vivian had called (Tr. 282-83). As a result of that conversation, she went to Mr. Lewis' apartment at 76 Forrester Street and met Vivian there (Tr. 283-84). Vivian told her what had happened. She was "crying and shaken and nervous, and her hair was standing up all over her head" (Tr. 284).

Mrs. Robinson took her home and examined her in the bedroom (Tr. 285). She had her pants on (Tr. 285). Mrs. Robinson testified that there was a thick white discharge all around her pelvis, which she identified as discharge from a male sexual organ on the basis of her experience as a married woman (Tr. 286). She then went to the bathroom, got a wet cloth and washed Vivian off as completely as she could (Tr. 286-87). She called the police, who took the two of them back to 76 Forrester Street (Tr. 287-288). From there they were taken to the hospital. The prosecutrix was examined "about 12:30 or quarter to 1:00, something like that", at which time she was leaning on her mother and shaking (Tr. 289). At the hospital, the clothes Vivian had worn there were turned over to the police (Tr. 291).[9]

7. *Officer Demilt's testimony*

Officer DeMilt responded to the Robinson home at about 9:35 on the night of March 27, 1966 (Tr. 305-06).[10] When

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[9] Mrs. Robinson's testimony indicated that she was not strict about violations of the family curfew; that she did not physically punish Vivian for coming home late; and that she "always talked to her and that was all" (Tr. 293). Vivian's testimony on cross-examination had been to the same effect (Tr. 122).

[10] The call had come into the dispatcher at 8:00 that evening (Tr. 306).

he saw Vivian, she was "crying, near hysterical"[11] (Tr. 307). He took her to the scene (Tr. 307). The officer had Mr. Lewis unlock the laundry room, and the prosecutrix pointed out where she was assaulted (Tr. 307-08). He noticed that "a fluorescent light bulb had been removed from its socket and was lying on one of the dryers on the east wall" (Tr. 308). When he learned that it had been moved by one of the boys, he dusted it for latent fingerprints (Tr. 310, 351). It was stipulated that the fingerprints from the bulb were those of appellant Bailey (Tr. 370-71). He also observed in the laundry scuff marks extending in a four or five foot radium, indicating "there was more than one person there on the floor at one time, or other" (Tr. 318).

About three-quarters of an hour after arriving at 76 Forrester Street, the officer accompanied the prosecutrix and her mother to D.C. General Hospital, arriving there about 10:15 p.m. There he obtained the clothing that she had on and turned them over to the Federal Bureau of Investigation laboratory. The laboratory test of those items was negative for sperm and for blood (Tr. 311-12, 316).

B. The Defense

1. *Dr. Evans' testimony*

After denial of motions for judgment of acquittal, Dr. Evans took the stand. She examined the prosecutrix about midnight on the night of March 27 (Tr. 394). She testified that the patient evidenced no acute distress; that there was no gross evidence of trauma—that is, no bruising or bleeding, broken bones or torn clothing; no bleeding from or laceration of the cervix; and no bleeding from

[11] The victim's condition was such that he restricted his interview with her, hoping to question her the next day when she was more composed (Tr. 313). He also testified that it definitely did not appear to him that the girl was putting on an act or feigning emotional disturbance (Tr. 328-29). Officer Harrell, who saw the prosecutrix at the precinct after she had come from the hospital, testified that she was "quite upset" (Tr. 343).

the vaginal vault or from the external gentillia; that there were no masses or lumps or tenderness of the adnexa; and that there had been marital introitus (Tr. 394-97). One of the questions of the report she had filled out was whether penetration was suspected. She did not fill in the blank provided for the answer to the question, stating that "this particular case did not lend itself to a yes or no answer to the question as it was worded" (Tr. 397). While the hymen was broken, she said she could not tell "whether it occurred last night or last week or last month, an examination does not reveal that" (Tr. 398). Another portion of the same question with respect to penetration was "If yes, was it forced". This the doctor answered negatively, saying that "the hymen was broken and therefore penetration at some time or other by something or other was suspected, but inasmuch as there was no laceration or bleeding I cannot say it was forced. There was no evidence that it had been forced" (Tr. 398).

She reported that the results of both the sperm tests she had done and that of a vaginal smear sent to the laboratory were negative (Tr. 399-400).

On cross-examination, it was established that there could be marital introitus without bleeding and laceration; that the presence of bruises and lacerations in vaginal areas would be a function of the relative sizes of the reproductive organs involved; that swelling of the adnexa did not necessarily occur as the result of a rape; that a person could have a sexual relationship and upon examination within six hours no sperm could be seen; and that the finding of sperm was dependent upon ejaculation within the vaginal vault, the cervix, or the uterus (Tr. 404-07). The doctor testified that she had "no information" as to whether adnexal tenderness would be present six hours after intercourse; that the cervix would not necessarily be lacerated after a rape; and that if there were only slight penetration of the vaginal vault, she could not tell whether there was penetration in the absence of any laceration, bruises or bleeding (Tr. 411-13, 414). She said that it was correct that when a sexual relationship, whether

forced or otherwise, occurred it would not necessarily follow that there would be lacerations, bleeding or trauma in the vaginal vault or the genital area (Tr. 414-15). She also testified that the tests for semen are not done on the area around the vaginal vault and that it would not necessarily follow that the uterus would be abnormal in size after a sexual relationship (Tr. 416-17). She could not recall the patient's emotional state, other than to say that she had been cooperative. (Tr. 418). Nor, she stated, would emotional distress be recorded if it fell short of hysteria or crying (Tr. 419, 420).

On rebuttual, defense counsel asked her if it was not a fair assumption that there would be some evidence of trauma, tearing, bleeding or some other extrinsic evidence if the prosecutrix had been forcibly penetrated while having her hands and legs held. She answered "I could not make that assumption on the basis of my examination. I can only say that I saw no evidence of bruises, bleeding, or other evidence of trauma" (Tr. 422). On recross-examination, she agreed that she was neither saying that the prosecutrix had been raped that night nor that she had not been raped that night (Tr. 423).

2. *Mrs. Bailey's testimony* [12]

The mother of appellant Bailey testified that she met Vivian Robinson two days before the alleged rape when she had come over to visit her daughter Diane. That evening, Diane walked her part of the way home (Tr. 442). She testified that she also came over that Sunday, and confirmed the fact that a number of teenagers were playing records in the basement. Eventually, she told them to leave because she was going to her sister's house. They did, and she locked the house and left (Tr. 443-44, 445).

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[12] Prior to her testimony, an FBI agent testified that tests on the clothing sent over to their laboratory by the Metropolitan Police Department had disclosed no semen or blood on those articles (Tr. 433-38).

Later that evening, the police came to the house looking for James and Larry. She told them that they were not there. James called his mother from a drug store in Eastover, Maryland. She told him that the police were looking for him and instructed him and whoever was with him to go to the precinct (Tr. 447-48, 453).

3. *The testimony as to truth and veracity*

Mr. Boykin, a playground director, testified that he had known appellant Bailey about four years and that he had a good reputation for truth and veracity (Tr. 462-64). Cross-examination disclosed that he apparently had discussed Mr. Bailey's reputation for truthfulness only with a co-worker (Tr. 468). As to Humphries, he testified that he was responsible and said "I think he is a truthful person" (Tr. 472).

Ernest Giles was called to the stand. He said that he had a conversation concerning one Derrol Johns with Miss Robinson, whom he had known casually for about two years (Tr. 475). The prosecutor objected, and it was sustained. Defense counsel's proffer was that Giles would impeach the testimony of Miss Robinson, but not her chastity, by saying that she told Giles that Johns had sexual relations with her (Tr. 476). Counsel said it went "not only to impeachment but also to her prior false accusation" (Tr. 476). The trial judge pointed out that it made no difference whether the prosecutrix was chaste or unchaste, and refused to "permit anything to be shown with reference to that. In other words, that he has had intercourse with her or somebody else has" (Tr. 477). When counsel alluded to the prosecutrix' statement that she did not recall having talked to Giles and did not recall telling him anything like that (see Tr. 145), the trial judge said that what counsel was attempting to show did not impeach her, because "[s]he said she doesn't recall" (Tr. 479). Counsel again pointed out that this involved prior false accusations, which proposition the trial judge rejected as having no place in this case, and not brought out on cross-examination (Tr. 479-80).

Mr. Giles was then permitted to testify on the prosecutrix's reputation for truth and veracity, which he said

was "not good" (Tr. 480-81). He named three persons with whom he purported to have discussed the prosecutrix's reputation for truth and veracity, one of whom was Derrol Johns (Tr. 483).[13]

Derrol Johns testified that he knew appellants and Miss Robinson, with whom he was casually friendly, and that her reputation for truth and veracity was "not too good" (Tr. 488, 493, 498). When asked with whom he had discussed her reputation, he named Ernest Giles, Diane Bailey, and one Elmer Coates, with whom Giles had also purported to discuss the prosecutrix's reputation (Tr. 483, 493).[14] He heard about the rape from Diane Bailey, before he discussed the prosecutrix's reputation for truth and veracity (Tr. 494). He saw appellants at James' house after the rape. He had been asked to come over by James. Defense counsel was also there (Tr. 499).

4. *Appellant Humphries' testimony*

Appellant testified that he was eighteen years of age on March 27, 1966. He said he was in the presence of Larry Bailey, James Bailey and Andrew Ford in the laundry room, but neither he nor any of the other boys had or attempted to have sexual relations with Vivian Robinson (Tr. 502, 525).

Humphries was close friends with Bailey and went to his home practically every day (Tr. 503-04). He saw Misses Cannon and Robinson and followed along to Miss Cannon's house (Tr. 504-05). Ford, the Bailey boys and Aaron Wright were there (Tr. 505-06). Miss Robinson had a conversation with James. Then she left with him and they started walking toward his house (Tr. 507-08).

The others followed but ended up at the laundromat, about half a block from the Bailey house (Tr. 508). They

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[13] At one point, with respect to these conversations, he said "If the rape was fourteen months ago, it was before that time" (Tr. 485). He knew both appellants (Tr. 483).

[14] He said this occurred "[s]ometime last summer" as did the conversation with Coates (Tr. 496, 497). He stated that Mr. Giles was a close friend of his (Tr. 497).

had been there about ten minutes when James showed up without Vivian, apparently to get a key from his younger brother (Tr. 509-10). They all returned to the Bailey house, but ran out of the back yard "because his mother didn't want all of us in the yard, and the father too" (Tr. 511). When the prosecutrix said she wanted to call her mother, Humphries heard Bailey reply in words to the effect that she could use a friend's phone (Tr. 514-15).[15]

When they got to 76 Forrester Street, Ford and Miss Robinson went in first (Tr. 517). As Humphries and the others got to the top of the steps, Ford emerged from beneath the steps and the prosecutrix was getting up (Tr. 518). Appellant testified that they could have been standing up under the steps but he had no idea what they were doing (Tr. 518). They continued down the steps and Larry Bailey knocked on Thomas Payne's door. No one answered it (Tr. 520-21). Since it was cold they decided to warm up on the dryer in the laundry room. Vivian walked in first, "all by herself" (Tr. 521-22). The lights were turned off. Humphries didn't know who did it, but testified that "[t]he light was over [James'] head" (Tr. 525).[16] From his perch atop a dryer, Humphries saw only that "everybody got behind the washing machine" when the lights went out" (Tr. 527-28).[17] According to him, there was only silence before Mrs. Johnson opened the door. When she closed it, they ran out (Tr. 528, 530). He testified that the door to the room was closed, and explained this by saying "that door has something at the bottom that keeps it open and maybe somebody must have knocked it out of the way" (Tr. 529). He said that someone pushed the prosecutrix to the floor, but he didn't see who pushed her (Tr. 530-31). After

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[15] At this point, the girl and Andrew Ford were in the lead (Tr. 516).

[16] Humphries saw no one jump up on a washing machine and take a bulb out (Tr. 526).

[17] He testified that the room was completely dark when Mrs. Johnson came to the door (Tr. 534).

they stopped running, he suggested that they go back to get the girl, but when they went back "she wasn't there" (Tr. 533).

Humphries was with James Bailey in the Eastover shopping center when he called his mother. He knew what she had said to him, but went home instead of going to the police station (Tr. 545-46).

5. *Dr. Stewart's testimony*

Defense counsel propounded to the doctor a hypothetical question roughly paralleling the government's case as it was established by the prosecutrix' testimony, Dr. Evans' testimony as to her examination, and the tests on the clothing taken from her at the hospital (Tr. 551-553). He opined that on those facts "there was no evidence to support . . . . [t]he fact that she had been sexually assaulted as far as having sexual relations" (Tr. 553). He was then told to further assume that the girl's hymen had been ruptured during the hypothetical attack and asked whether, within a reasonable degree of medical certainty, there would be traces of blood or signs of trauma, or some remnants of the hymen remaining. He answered that there would be (Tr. 555).

On cross-examination, he testified that a person who has been raped would not necessarily show signs of laceration; that if the hymen were broken prior to the rape, lacerations need not necessarily appear in an examination six hours after the rape; that it is possible for the hymen to be broken other than from intercourse; that he would not base his opinion with respect to a rape on the presence or absence of acute distress; that the fact that no bruises were found does not have any bearing on the case at all and neither would the presence or absence of trauma or the size of the uterus (Tr. 558-60, 562-64). He also said that usually there were no lacerations on the cervix as the result of forcible sex, so that would play no part in his opinion based on the hypothetical set of facts (Tr. 565). Similar statements followed with respect to laceration of the vaginal vault, tenderness of the

adnexa, and marital introitus (Tr. 565-68). He agreed that evidence of slight penetration might not show up in an examination, and that sperm tests would be negative if ejaculation occurred outside of the genitals of the female (Tr. 569-70). The doctor admitted that his opinion as an expert was based on the fact that there was no sperm seen on the smears and the fact that the tests on the clothing were negative (Tr. 579).

6. *Appellant Bailey's testimony*

Appellant's version of the events of March 27 was as follows: He arrived at the Cannon home after coming from the Elmira drug store. He was there about half an hour. During a conversation with the prosecutrix, she asked him to walk her home (Tr. 585-86). He told her he could not do so because he had left his wallet at home [18] (Tr. 587). Vivian said she would walk back towards his house to obtain the wallet so that he could walk her home. He tried the front and back doors of his house, but he couldn't get in (Tr. 587). He then told her to go home by herself and walked down to the Elmira drug store, leaving her "standing there around the back of [his] house" (Tr. 588). When he came back up the street, he saw his brother, Andrew Ford, Ronald Humphries and Aaron Wright in the back yard (Tr. 589-90). Without any discussion of about where they were going, they started on their way over to 76 Forrester Street, taking what he described as "the back way, over the fence" (Tr. 590). He said that he did not know where the group was going. Ford and the prosecutrix were walking ahead of the group (Tr. 590). When they got to the steps leading into the basement, Ford and the prosecutrix were under the steps (Tr. 590-91). She walked into the laundry room and someone suggested that they go in because it was warmer in there (Tr. 591). They (appellant, his brother,

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[18] He explained that "around that neighborhood there is detectives and plainclothesmen and they stop and ask you . . . for some identification and if you don't have no identification to show them they will run you down to No. 11 Precinct" (Tr. 587).

Ronald Humphries and Miss Robinson) were "in there talking, laughing, and then [appellant] heard somebody coming down the steps" (Tr. 592). While they were there, he saw no one touch Miss Robinson, nor did he or anyone else have or attempt to have sexual intercourse with her (Tr. 592-93). Before the door was opened, someone put out the lights, but he did not know who had done it (Tr. 594).

He explained that he was "jumping up on the light bulb" because he played basketball in school and he was "just jumping up at the lights to see how high [he] could jump, and when [he goes] to any place sometime [he does] that" (Tr. 594). He did not recall seeing anyone remove the bulb, nor did he remember taking it out himself (Tr. 595). When the door was opened, the others started hiding behind the washing machines. He saw Vivian fall when Ford pushed her away from "his" machine (Tr. 595). When they heard Mrs. Johnson going up the steps, they all ran out (Tr. 596). They proceeded to the Peoples drug store in the Eastover shopping center, seeing Aaron Wright along the way (Tr. 597). Bailey estimated that they had spent about nine or ten minutes in the laundry room (Tr. 597).

On cross-examination, appellant Bailey said that he was nineteen at the time of the alleged offense, and that he had been married two months and had a seven month old child at the time of trial (Tr. 599, 601). When he left Miss Robinson to go down to the drug store, telling her to go home by herself, he went to see if he could find his mother. Larry, Andrew Ford, appellant Humphries and Larry Cannon were there. He did not ask his brother for a key. He was at the drug store about ten minutes (Tr. 604, 605). He came back to his house with them (Tr. 605). Miss Robinson was still standing in back of or on the side of the Bailey house (Tr. 605). She said nothing to him. He said nothing to her, and he could not remember anyone saying anything to her (Tr. 606). They started over the fence, but did not run (Tr. 606-07). He could not remember any conversation that he had with her about phoning her

mother (Tr. 607). According to appellant, Miss Robinson then started walking with Andrew Ford, preceding the rest of the group by about 15 steps (Tr. 608). Appellant had no intention of going to 76 Forrester Street. He saw Ford and Miss Robinson go into the apartment building, and they followed, with the exception of Mr. Wright (Tr. 609-10). Appellant said he "wasn't going to see nobody" and that he just walked in with the group (Tr. 610).[19] He testified that he got to 76 Forrester Street "about a minute and a half" after Ford did (Tr. 611-12). They went straight downstairs and saw Ford and Miss Robinson coming from under the steps (Tr. 612).

When Miss Robinson entered the laundry room, he followed (Tr. 614). The fluorescent bulb was lit. While he was jumping up "[t]hree or four times" to touch the light bulb, everyone else was standing around (Tr. 615).[20] Vivian was "[j]ust standing around". The group was ignoring her. No one talked to her during the nine or ten minutes that they were there. They did not talk to each other (Tr. 616). When he heard the approaching footsteps of Mrs. Johnson, he stood and did nothing (Tr. 617, 631).

After appellant ran out of the building with the others, they did not discuss who turned the lights off, nor did they have any conversation about what took place in the laundry room.[21] He testified that he did not go back to try to find the prosecutrix, as appellant Humphries had

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[19] Somebody mentioned the name Thomas Payne, but appellant did not remember who did (Tr. 611). Larry Bailey knocked at the door of what appellant said was Thomas Payne's apartment, but the two of them had no conversation about seeing Payne (Tr. 613-14).

[20] He testified that no one was sitting on a dryer (Tr. 615). He did not remember seeing a fluorescent bulb on one of the dryers (Tr. 621).

[21] He did talk with Andrew Ford after leaving the apartment building, but not about his circumcision (about which he knew) or about anyone having sex with the girl. He testified that he was telling Ford that he "had to get home to go to sleep to go to work tomorrow" (Tr. 625, 628).

testified. Instead, he went to the Peoples drug store in the Eastover shopping center (Tr. 624). There, he talked with his mother by phone and told appellant Humphries what she had said (Tr. 627).

C. Rebuttal

On rebuttal, Mrs. Robinson said that she had heard the defense witness Johns testify that he had moved into the general area where she lived in 1964. However, she testified that at that time, they had been living at 1476 Newton Street, five or six miles removed from the area to which he had referred (Tr. 639).

III. Post-Testimony Proceedings

At a bench conference prior to summations, the trial judge asked defense counsel for their views with respect to charging the lesser included offense of assault with intent to commit carnal knowledge. Both said they did not want it. Mr. Forester, counsel for appellant Bailey, said it was his understanding "that this is a separate statute . . . and that it is not, necessarily, a lesser included offense of carnal knowledge. The Grand Jury did not indict for that and the evidence would not support it" (Tr. 666). The trial judge indicated that she would give the instruction (Tr. 669). Counsel for appellant Humphries remained opposed to giving the instruction (Tr. 669). Counsel for appellant Bailey stated:

> I feel the facts do not warrant it, the facts in evidence on the Government's behalf do not show an assault. They show the actual completed carnal knowledge and, according to the girl's testimony, four times. So we would strongly oppose any instruction in that the facts do not support it (Tr. 669-70).

During summation, Mr. Forester argued that there was no "in between"; the jury should either believe the prosecutrix's testimony or find that "this attack simply did not occur" (Tr. 720). Before counsel for Humphries began his summation, Mr. Forester requested that the court

instruct on the lesser included offense of simple assault. Counsel for Humphries noted that evidence had been introduced that the prosecutrix had been pulled down the steps and said "Well, if there's going to be an instruction on attempted carnal knowledge, we would respectfully request . . . the simple assault instruction, also, because there is just as much evidence of simple assault as there is attempted carnal knowledge" (Tr. 726). The trial judge said "I don't believe so, and I don't believe I will give the simple assault" (Tr. 727). Both defense counsel replied "All right" (Tr. 727). The trial judge charged the jury on the lesser included offense of assault with intent to commit carnal knowledge (Tr. 768-69). No simple assault charge was given.

After the instructions were given, Mr. Forester said "First of all, the objections that were previously noted we would renew. . ." (Tr. 775). The trial judge asked if counsel was referring to the objections previously noted on the charge, to which counsel replied "The . . . lesser included offense". He also objected "to the testimony which the Court summarized—the testimony pertaining to corroboration" (Tr. 775).[22]

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[22] The charge to the jury on corroboration was in pertinent part:

> The law does not permit a conviction of the charge of carnal knowledge on the basis of the testimony of the complaining witness standing alone. Corroboration of her testimony is required.
>
> This rule means that in this case corroboration of the testimony of Vivian Robinson is required. Such corroboration, however, need not be by eye witnesses. Eye witnesses can hardly ever be obtained to such an offense as carnal knowledge.
>
> Corroborating circumstances may be sufficient corroboration; there may be testimony of circumstances which, if believed by the Jury, the Jury may, if it deems it wise and proper, consider in the nature of corroboration.
>
> In a carnal knowledge case such as exists before you, corroboration is required in the sense that there must be proof of circumstances surrounding the parties at the time which tend to support the story of Vivian Robinson or which point to the probability of guilt of the accused. or at least corroborate indirectly the testimony of Vivian Robinson.
>
> The corroboration to which I have referred is in relation to two matters: First, carnal knowledge—that is, sexual inter-

course with the female named and that she was then under 16 years of age, and, second, the identity of the defendants as persons who had sexual intercourse with such female.

This requirement of corroboration means that there must be evidence independent of the testimony of Vivian Robinson of facts or circumstancs which tend to support the testimony given by her. This evidence may be direct or circumstantial, or both.

I do not expect to summarize for the jury the evidence in this case, but for clarification I wish to refer to some of the testimony which the jury may consider if it sees fit to do so, in the nature of corroboration.

When I refer to testimony, the jury is to keep in mind that if its recollection of the testimony differs from mine, then the jury must be guided by its own independent recollection.

It is in evidence that Vivian Robinson promptly complained to Mrs. Johnson. You will recall that Mrs. Johnson testified that she went to the laundry room, found the door closed, the lights out, and saw several men run out of the back door, whereupon she went back up the stairway. She further testified that Vivian Robinson came behind her on the stairway, was crying, wringing her hands, and complained that she had been raped and asked to telephone her mother.

There was also evidence that Vivian Robinson also promptly complained to her mother; later in the same evening she complained to the police.

Mrs. Robinson, the mother of the girl, testified that she examined the girl and found and wiped off of her a discharge which she described. Several witnesses testified to the physical and nervous condition of the girl. One witness demonstrated how she said the girl was shaking or trembling.

Several witnesses, besides Vivian Robinson gave testimony relative to the presence of the defendants at the time and place of the alleged offense.

An expert witness identified fingerprints found at the place in question on a light fixture as the fingerprints of the defendant James Bailey, and the brother of James Bailey identified James as one of the men present at the time and place in question. Another witness identified both defendants as persons known to him who entered the building involved with Vivian Robinson and who were seen by him in the area shortly thereafter.

The Jury may consider whether evidence of circumstances tends to support the story of Vivian Robinson or points to the probable guilt of the accused, or corroborates indirectly the testimony of Vivian Robinson.

If the Jury believes that such evidence does so, then the Jury may regard it as corroboration, but if the Jury does not

STATUTE INVOLVED

Title 22, District of Columbia Code, Section 2801 provides:

> Whoever has carnal knowledge of a female forcibly and against her will, or carnally knows and abuses a female child under sixteen years of age, shall be imprisoned for not more than thirty years: *Provided*, That in any case of rape the jury may add to their verdict, if it be guilty, the words "with the death penalty," in which case the punishment shall be death by electrocution: *Provided further*, That if the jury fail to agree as to the punishment the verdict of guilty shall be received and the punishment shall be imprisonment as provided in this section.

SUMMARY OF ARGUMENT

I

The overwhelming weight of authority is to the effect that jurors may be "death-qualified" in cases in which a death sentence may be imposed. That is also the rule in this jurisdiction, and it should be followed here.

II

Appellants' argument as to the applicable standard of corroboration in offenses of a sexual nature is precluded by a great many cases stating that corroboration of the "circumstances surrounding the parties . . . such as to point to the probable guilt of the accused, or, at least, corroborate indirectly the testimony" of the victim is sufficient.

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so believe, then the stated requirement of the corroboration would not have been met.

Should the Jury find that to an extent the testimony of Vivian Robinson is not corroborated, in the manner required by the law, then the Jury is told that to such extent the Jury may not consider her testimony as evidence in the case. (Tr. 760-64).

III

The trial judge did err in drawing on the government's evidence as adduced at trial to explain the corroboration to the jury. Under *Roberts* v. *United States*, *post*, and *Lynch* v. *United States*, *post*, the trial judge's actions were clearly proper.

IV

The motions for judgment of acquittal at the end of the Government's case were properly denied. Standing alone, the prosecutrix's testimony would have been insufficient basis for a conviction. But there were ample corroborating circumstances here. There were prompt reports of the offense to strangers and to the police. The rape allegedly occurred on the cement floor of a laundry room, and she was seen to have dirt on her dress. She was observed to be crying and upset, and nearly hysterical, and one witness testified that she was not feigning distress. Semen was found on the prosecutrix. The testimony placed appellants in the darkened, closed room with the prosecutrix during the time that the rape was alleged to have occurred, and appellant Bailey's fingerprints were found on a bulb which the prosecutrix said had been removed just before the rape occurred. They ran away when discovered.

Renewed motions for judgment of acquittal at the end of all the evidence were also properly denied. Both doctors in effect admitted that there need not necessarily be physical signs that a rape had occurred. It was for the jury to determine whether the absence of semen or blood on her clothing was determinative. Appellants both placed themselves in the prosecutrix' presence at the pertinent time and place, and their stories did not carry the ring of truth. Under the circumstances, including the fact that penetration need only be slight and ejaculation is unnecessary, it cannot be said that there was no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt.

V

There was no abuse of the trial judge's discretion in disallowing a defense witness to testify that the prosecutrix told him that she had sexual relations with another defense witness, nor in refusing to allow the latter witness to testify that this had not occurred. Had such testimony been allowed, it would have been inextricably fused and confused with evidence of unchaste conduct of the prosecutrix, which is impermissible in a carnal knowledge case, and led to proliferation of the issues. In any event, appellants sought to show by this testimony that the prosecutrix was not to be believed, which proposition was asserted by testimony that her reputation for truth and veracity was not good.

VI

No reversible error in refusing to instruct on simple assault. The evidence did not justify it, and defense counsel in effect so stated and argued. In any event, the evidence was such that if the jury found that appellants touched the prosecutrix at all, they did so with the intent to carnally know her, whether they succeeded or not.

VII

The trial judge did not abuse her discretion in refusing to grant a new trial. The inconsistencies which appellants claim arose from a later trial of a juvenile allegedly involved in the same affair were either impeaching, not material to the issue, or such as would not probably produce an acquittal upon retrial. In other than the claimed respects, the testimony at the later trial was consistent. Where the trial judge had the advantage of both transcripts and heard and saw the witnesses at the first trial, her exercise of discretion, particularly in the light of the supposedly exculpatory defense testimony, should not be lightly brushed aside.

ARGUMENT

I. No infirmities existed in this conviction because the trial court permitted the government to question prospective jurors on *voir dire* as to their belief in capital punishment and excused 6 of 7 prospective jurors opposed to it.

(Tr. 7, 23)

Appellants' argument in this regard must fail. While the prosecutor indicated that the government would not ask for the death penalty in this case, the death penalty was nevertheless in issue. 22 D.C. Code § 2801 provides that "in any case of rape the jury may add to their verdict, if it be guilty, the words 'with the death penalty' ". Thus, regardless of the government's position with regard to the death penalty, the jury could nevertheless impose it under the clear words of the applicable section of the statute.[23] And, to the extent that appellants' position is that the death penalty was not at issue, it is clearly erroneous.

Appellants' argument here is controverted by the overwhelming weight of authority holding that jurors may be disqualified for cause in a capital case in which it is determined that they have settled convictions against imposition of the death penalty. See, *e.g.*, *State* v. *Childs*, 269 N.C. 307, 152 S.E.2d 453 (1967); *Annot.*, 48 A.L.R.2d 563 (citing cases from 35 states and the federal courts in support of the general rule).[24] Among the more recent federal decisions recognizing this principle are *Pope* v. *United States*, 372 F.2d 710 (8th Cir. 1967) (rejecting argument that exclusion of such persons re-

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[23] The trial judge said as much prior to and during *voir dire* (Tr. 7, 23). Defense counsel emphasized this during summations (Tr. 686, 718, 722, 727).

[24] Contrary decisions in Iowa and South Dakota are to the effect that under a statute which lists numerous specific grounds of challenges for cause but does not list antagonism to capital punishment, the State is restricted to use of its preemptory challenges on this ground. *E.g.*, *State* v. *Wilson*, 234 Iowa 60, 11 N.W.2d 737 (1943); *State* v. *Lee*, 91 Iowa 499, 60 N.W. 119 (1894); *State* v. *Garrington*, 11 S.D. 178, 76 N.W. 326 (1898).

sulted in an unfair or illegally unrepresentative jury in violation of the Sixth Amendment) and *Clark* v. *Grimes*, 374 F.2d 550 (5th Cir. 1967) (*habeas corpus* petitioner seeking to obviate requirement of exhausting state remedies because under Georgia law[25] there was clearly no constitutional invalidity in "death-qualifying" jurors.)

But we need not range so far afield to negate the contention that appellant here presses. In *Turberville* v. *United States*, 112 U.S. App. D.C. 400, 303 F.2d 411, *cert. denied*, 370 U.S. 946 (1962), this Court examined and rejected appellants' argument, stating that it "has not as yet received the sanction of any court. We cannot accept it." *Turberville, supra* at 409, 303 F.2d at 420. The Court, in reasoning found persuasive and followed in *People* v. *Witherspoon*, 36 Ill.2d 471, 224 N.E.2d 259 (1967), *cert. granted*, 36 U.S.L. Week 3286 (Jan. 15, 1968); and *State* v. *Childs, supra*,[26] argued *inter alia*:

> No proof is available, so far as we know, and we can imagine none, to indicate that, generally speaking, persons not opposed to capital punishment are so bent in their hostility to criminals as to be incapable of rendering impartial verdicts on the law and the evidence in a capital case. Being not opposed to capital punishment is not synonymous with favoring it. Individuals may indeed be so prejudiced in respect to serious crimes that they cannot be impartial arbiters, but that extreme is not indicated by mere lack of opposition to capital punishment. The two antipathies can readily coexist; contrariwise either can exist without the other; and indeed, neither may exist in a person. It seems clear enough to us that a person or group of persons may not be opposed to capital punishment and at the same time may have no particular bias against any one criminal or indeed, against criminals as a class; people, it seems to us, may be completely without a controlling con-

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[25] *E.g.*, *Williams* v. *State*, 222 Ga. 208, 149 S.E.2d 449 (1966); *Cherry* v. *State*, 220 Ga. 695, 141 S.E.2d 412 (1965).

[26] See also *State* v. *Bumpers*, 270 N.C. 521, 155 S.E.2d 173 (1967), *cert. granted* 36 U.S.L. Week 3286 (Jan. 15, 1968).

viction one way or the other on either subject. We think the premise for the thesis has no substance.

From all these considerations[27] we conclude that the trial judge did not commit error when she excused six of the seven prospective jurors.[28]

II. The requirement of corroboration of the prosecutrix' testimony in a rape case was amply satisfied here.

We understand appellants' position to be not that there was insufficient corroboration of "circumstances surrounding the parties . . . such as to point to the probable guilt of the accused, or, at least, corroborate indirectly the testimony of the prosecutrix", *Ewing* v. *United States*, 77 App. D.C. 14, 16, 135 F.2d 633, 635 (1942), *cert. denied*, 318 U.S. 776 (1943),[29] but rather that there was no independent corroboration that the prosecutrix was penetrated by a male organ at the time and place alleged. Appellant directs us to no case which so holds, and a long line of authority is contrary to his position.[30] *E.g.*, *Ewing*, *supra; Kidwell, supra; Walker* v. *United States*, 96 U.S. App. D.C. 148, 223 F.2d 613 (1955); *Roberts* v. *United States*, 109 U.S. App. D.C. 75, 284 F.2d 209 (1960),

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[27] Earlier, the Court had noted that the accused is entitled to a fair-cross section of the community when the names are put in the box from which the panels are drawn; that opposition to capital punishment may stem from a variety of reasons; that appellant's assertion was really that he had a right to have on a jury some who may be prejudiced in his favor—that is, opposed to capital punishment—and that his constitutional rights extended only to having an impartial jury; and that it did not follow that rejecting qualified persons for insufficient cause would deprive appellant of his right to an impartial jury. *Turberville, supra* at 408-09, 303 F. 2d at 419-20.

[28] *Id.* at 409-10, 303 F.2d at 420-21. *Turberville* was cited without criticism in *Long* v. *United States*, 124 U.S. App. D.C. 14, 360 F.2d 829 (1966).

[29] Citing *Kidwell* v. *United States*, 38 App. D.C. 566, 573 (1912).

[30] Several jurisdictions require no corroboration of the complaining witness at all. Comment, 52 Yale L.J. 55, 61 n.44 (1952).

cert. denied, 368 U.S. 863 (1961); *Thomas* v. *United States*, D.C. Cir. No. 20,287, decided May 4, 1967.[31]

In this light, we submit that appellant's energies be directed, as appellant himself suggests,[32] toward the sufficiency of the evidence—within the context of the corroboration rule as it now exists.

III. The trial judge did not err in summarizing the evidence on corroboration in her instructions.

(Tr. 591-92, 760-61, 762, 763-64, 765, 777-78)

Appellants complain of the trial judge's summary of the evidence on corroboration.[33] The government can discern no grounds for complaint on this score. The trial court expressed no opinion on the evidence. It was clear that the reason for mentioning this evidence to the jury was to illustrate the meaning of corroboration in the context of this case (Tr. 760-61, 762). She carefully pointed out in explaining corroborating circumstances that "there may be testimony of circumstances, which, if believed by the Jury, the Jury may, if it deems it wise and proper, consider in the nature of corroboration" (Tr. 761). In referring to the testimony to clarify what corroboration meant, it was pointed out that the jury "may consider it if it sees fit to do so, in the nature of corroboration" (Tr. 762). It was made clear that if the jury considered

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[31] The standard for which appellant argues would prove unworkable as a practical matter. Since penetration, however slight, is sufficient, and ejaculation is unnecessary, the absence of the direct evidence which appellant would apparently require would leave the victim's right to personal security unprotected in situations in which the victim is not a virgin or the attacker is incapable of or fails to achieve ejaculation.

[32] Br. 25.

[33] Apparently, they also complain that the trial judge inadvertently stated that appellant Bailey's brother "identified [him] as one of the men present at the time and place in question." (Tr. 763). But this mistake was soon corrected (Tr. 777-778). Nor was there any issue in the case as to whether Bailey was there—in fact, he said he was there himself (Tr. 591-92). And, just before the error was made, the jury was reminded that if their recollection differed from the trial judge's, theirs controlled (Tr. 762).

that evidence of the circumstances supported by the prosecutrix' testimony or pointed to the probable guilt of the accused, they *may* regard it as corroboration—and to the extent that it was not corroborated, they were told to disregard her testimony (Tr. 763-64). It was also made clear that the jury could not convict without such corroboration (Tr. 765). The trial judge's actions here are squarely governed by *Roberts* v. *United States*, 109 U.S. App. D.C. 75, 284 F.2d 209 (1960), *cert. denied*, 368 U.S. 863 (1961), and did not prejudice appellants.[34] Moreover, appellants' contention here controverts the proposition that the trial judge may guide and assist and aid inexperienced laymen in their consideration of the evidence. *Billeci* v. *United States*, 87 U.S. App. D.C. 274, 282, 184 F.2d 394, 402 (1950).

IV. The trial judge properly denied appellants' motions for judgment of acquittal.

(Tr. 22, 57-58, 60-62, 64-69, 75, 78, 81, 83-84, 89-90, 135, 168-69, 188-89, 190, 192, 206-07, 212, 215-17, 220, 226-27, 229, 231-32, 237, 240-47, 249-50, 253-54, 259, 264-66, 274, 279, 284, 286-87, 289, 304, 306-08, 313, 328-29, 343, 350-51, 370-71, 423, 554, 579)

In reviewing the sufficiency of the evidence, this Court and the trial judge "must assume the truth of the Government's evidence and give the Government the benefit of all legitimate inferences to be drawn therefrom." *Curley* v. *United States*, 81 U.S. App. D.C. 389, 392, 160 F.2d 229, 232, *cert. denied*, 331 U.S. 837 (1947). See *Glasser* v. *United States*, 315 U.S. 60 (1942); *Crawford*

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[34] *Sullivan* v. *United States*, 85 U.S. App. D.C. 409, 178 F.2d 723 (1949), cited by appellant involved a clear expression by the trial judge of an opinion adverse to appellant and is not here applicable. *Cf. Vinci* v. *United States*, 81 U.S. App. D.C. 386, 159 F.2d 777 (1947) (claim that gestures and expressions of trial judge indicated to jury that he was not impressed by appellant's story rejected as not exceeding permissible bounds of judicial comment). The issue which appellants present here was briefed and rejected in *Lynch* v. *United States*, 114 U.S. App. D.C. 59, 310 F.2d 864 (1962).

v. *United States*, —— U.S. App. D.C. ——, 375 F.2d 332 (1967). Unless it can be said that there was "no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt", *Curley*, *supra* at 392-93, 160 F.2d at 232-33, denial of a motion for judgment of acquittal is proper.

Here, there is no contention that corroboration of the identity of the attackers was insufficient, nor could there be on the facts as they unfolded at trial. The issue then is narrowed to sufficiency of the evidence of the *corpus delecti* and the corroboration thereof. We submit that the evidence below, viewed in the light most favorable to the government, was sufficient to withstand the motions for judgment of acquittal.

The prosecutrix, 15 years old at the time of the alleged offense, testified [35] that James Bailey had asked to walk her home (Tr. 57); that she agreed after some hesitation (Tr. 58), that he asked her to walk him home to get his wallet first (Tr. 58); that when he couldn't get into his house he told her to wait there; and that he returned just as Larry Bailey, Ron Humphries and Andrew Ford arrived at his house (Tr. 60-61). She then told James that she wanted to call her mother, and he said she could do so from "this boy's house" (Tr. 61.) The group then proceeded to 76 Forrester Street. She and James Bailey were walking in front, with the others behind (Tr. 62). When they got there, James started down into the basement. She said that she wasn't going down there and turned to run, whereupon Larry Bailey grabbed her and they pulled her down into the laundry room, which was then lighted (Tr. 64-66). James then jumped up onto one of the machines and removed the light bulb (Tr. 67).[36] She

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[35] The events prior to this request are set out in the Counterstatement.

[36] Before the lights went out, she saw the faces of James Bailey, Larry Bailey, Andrew Ford, and Ronald Humphries (Tr. 168-69). Aaron Wright later testified that he saw James Bailey, Ronald Humphries, Larry Bailey and Andrew Ford walking "about a step" behind Miss Robinson, after which they went into 79 Forrester Street (Tr. 188, 189). He and Larry Cannon had been with the group, but did not go in (Tr. 190, 192).

was thrown to the cement floor (Tr. 68). The prosecutrix' pants were pulled down, but not completely off and her dress was drawn up (Tr. 69, 81). She testified that "four of them had intercourse" with her and that all four of them put their penises into her vagina (Tr. 75, 78). During this period, she said, the boys were laughing and giggling (Tr. 135).

When Mrs. Johnson pushed the door to the laundry room open, "they all jumped and ran" out of the back door (Tr. 83). The prosecutrix then testified that she "went and caught Mrs. Johnson"; told her that she had been raped and asked her if she had a phone from which she was going to call her mother (Tr. 83, 84). She described herself as upset and crying (Tr. 84). Mrs. Johnson took her to the apartment of the resident manager, Mr. Lewis, where she told him the same thing (Tr. 89). When her mother arrived at 79 Forrester Street, the prosecutrix told her what had happened (Tr. 90).

The testimony of other witnesses corroborated the prosecutrix' story. Mrs. Johnson, a resident of the apartment at 76 Forrester Street, testified that when she went down into the laundry room to get her laundry, she heard talking and laughing (Tr. 220). The door to the room, normally kept open, was closed (Tr. 224). She pushed open the door, but since the lights, which were "always" kept on, did not come on when she tried the switch, she turned and started back upstairs (Tr. 206, 207, 215-17). She heard a noise and turned around to see "all of the boys running out of the back door" after exiting from the laundry room (Tr. 209, 220). A girl she later learned was Miss Robinson came up the steps crying with "her head . . . down like that" and asked if she could use her telephone (Tr. 207, 212). Miss Robinson "said that she had been raped" (Tr. 212). Thus did Mrs. Johnson's testimony evidence both a prompt report of a rape to a total stranger and the expectable emotional condition of the prosecutrix. *Cf. McQuinn* v. *United States*, 89 U.S. App. D.C. 197, 198, 191 F.2d 477, 478 (1951). The testimony of the resident manager revealed that when Mrs. Johnson

brought the prosecutrix to his apartment, she was crying and "wringing her hands like that"; that he thought "she had a little dirt on her dress like, a little dust", and that she said "somebody carried her down there and raped her in the laundry room" (Tr. 226, 229, 230, 233).[37] *Cf. Thomas* v. *United States*, D.C. Cir. No. 20,287, decided May 4, 1967 (slip opinion at 4) (Court noted prosecutrix' description of event supported *inter alia* by her prompt report, the condition of her clothing, and her reported emotional condition).

Andrew Ford, who had admitted in Juvenile Court that he had had sexual relations with the prosecutrix,[38] gave testimony which was corroborative of the circumstances surrounding the parties. He said that he and the three others were in the laundry room with Miss Robinson; that the lights were off; and that when Mrs. Johnson came to the door he and the three others ran out (Tr. 243, 244, 246-47).

More corroboration emerged from the testimony of Miss Robinson's mother and the investigating officer. The former testified that when she came to get her daughter after receiving word of her telephone call "she was cry-

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[37] His testimony also corroborated the prosecutrix' statements with respect to the darkened laundry room and the removal of the light bulb. He said that the someone had taken the bulb out and put it on the washing machine, and that the area was dark (Tr. 229, 232, 237). He left everything like it was (except for turning on the lights) and locked the room until the police came (Tr. 226-27, 231).

[38] He began his testimony by saying that he had sexual relations with the prosecutrix in the basement, in the company of James Bailey, Larry Bailey and Ronald Humphries (Tr. 240, 241). He said this occurred under the steps leading to the basement before all concerned went into the laundry room (Tr. 242, 249-50). Later, he said that although he was on top of her for a couple of minutes; she had no pants on; he put his penis up to her vaginal area; that he agreed that he had sex with her, he didn't put his penis inside of her (Tr. 245, 264, 274, 279). He claimed that this was because he had just been circumcized and he could not have an erection (Tr. 253, 254). He testified, however, that the stitches "was kind of dissolved" (Tr. 265). He was a close friend of both appellants (Tr. 266).

ing and shaken and nervous, and her hair was standing up all over her head" (Tr. 284). Her daughter told her what had happened (Tr. 284). When she took her home and examined her "there was a white discharge all around her pelvis", which she said on the basis of her experience as a married women had come from a male organ (Tr. 286).[39] She testified that her daughter was still shaking all over when she was examined at the hospital (Tr. 289.) The latter, Officer DeMilt, testified that the prosecutrix was "crying, near hysterical" when he responded to her home at about 9:35 p.m. (Tr. 304, 306, 307). In fact, he curtailed his interview of her until the next day because of her emotional state (Tr. 313). He said that it definitely did not appear that the prosecutrix was putting on an act of "faking" emotional disturbance (Tr. 328-29).[40] He took Miss Robinson back to the laundry room of the apartment, where he noticed that a fluorescent light bulb had been removed from its socket and was lying on one of the dryers (Tr. 307-08).[41] It was stipulated that fingerprints on the bulb were those of appellant Bailey (Tr. 370-71).

With the prosecutrix's testimony as to penetration and the foregoing testimony as to the prosecutrix's prompt report to two strangers and to her mother, her emotional condition (which was said not to have been faked), the dirt on her dress,[42] the darkened room, the closed door and the presence of the four boys therein, the removed light bulb with Bailey's fingerprints on it and the testimony of the mother as to semen on the prosecutrix, the trial judge could properly conclude that reasonable jurymen

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[39] She washed Vivian off as completely as she could and called the police (Tr. 286-87).

[40] Officer Harrell of the Sex Squad also testified that prosecutrix was "[q]uite upset" when he saw her at the Eleventh Precinct about 1:15 a.m. the next morning (Tr. 343).

[41] He took it for fingerprinting (Tr. 313, 350-51).

[42] That another Government witness "explained" the dirt on prosecutrix's dress (Br. 23) is of no consequence. See *Curley, supra.* In any event, the testimony to which appellant alludes was highly suspect (See Tr. 259).

need not necessarily have a reasonable doubt that the offense charged had in fact been committed by appellants. Accordingly, the motions made at the close of the government's case for judgment of acquittal, based on the misconceived notion that corroboration of actual penetration is required, were properly denied. See *United States* v. *Fuller*, 243 F. Supp. 203, 204-05 (D.C.D.C. 1965) (direct medical evidence of penetration not required).

The renewed motions for judgment of acquittal at the end of all the evidence were also properly denied. The defense called Dr. Evans to testify as to her examination of the prosecutrix. On the basis of that examination, she candidly admitted she could not say whether the prosecutrix was or was not raped that night (*e.g.*, Tr. 423). Dr. Stewart opined that on the basis of the hypothetical question propounded to him, there was "no medical evidence that she had had sexual relationships" (Tr. 554). But it was clear that he based his opinion solely on the negative sperm test and the fact that the clothing tested was negative for sperm and blood, and not the elements of the medical report (Tr. 579). And he was forced to admit that it was possible that she could have been slightly penetrated and that these signs would not have been present (Tr. 581). The facts and assumptions underlying his opinion were amply exposed in a searching cross-examination, and the jury could draw different ultimate inferences. *Cf. King* v. *United States*, 125 U.S. App. D.C. 318, 372 F.2d 383 (1966). They were not bound by his opinion and under the circumstances, involving the possibility of slight penetration and no ejaculation within the examined areas, they were just as able as he was to make a common sense determination as to whether indications of intercourse would necessarily appear from the sperm test and the tests of the clothing.

The appellants' stories were corroborative of the circumstances surrounding the parties. They were in the laundry room with Vivian and the others. The lights were turned out. Bailey did touch the bulb. They all ran out together when Mrs. Johnson appeared. In short,

they agreed with the essence of the government case except that they denied touching the prosecutrix. Such a state of affairs raised a question of credibility,[43] the resolution of which was for the jury. *E.g.*, *Trimble* v. *United States*, 125 U.S. App. D.C. 173, 369 F.2d 950 (1966).

V. The trial judge did not abuse her discretion in refusing to allow a defense witness to testify that the prosecutrix told him that she had had sexual relations with another defense witness nor in refusing to allow the latter witness to testify that this had not occurred. Even if error occurred, it was harmless error.

The question here is whether the trial judge abused her discretion. Cf. *Lindsey* v. *United States*, 77 U.S. App. D.C. 1, 133 F.2d 368 (1942); McCormick, EVIDENCE 64. We submit that the trial judge's discretion was clearly not abused. Evidence of unchaste conduct by a prosecutrix under the age of sixteen is not admissible for the purpose of affecting her credibility. *Sacks* v. *United States*, 41 App. D.C. 34 (1913). Yet under the guise of a general attack on the prosecutrix's credibility defense counsel sought to show "[t]hat she at one time told Ernest Giles that Darol Johns had sexual relations with her", and the trial judge could properly conclude that this was so. Moreover, the trial judge could properly conclude that this excursion would only needlessly proliferate and confuse the issues in the case, especially in view of the fact that the prosecutrix had testified during cross-examina-

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[43] Appellants' versions of the events, taken singly or compared one with the other and with the testimony of other witnesses was such as to cast doubt on their veracity. It is for that reason that appellee has set them out in considerable lengh in the Counterstatement. Among the noteworthy elements of that testimony was that neither saw the laundry room light turned off; that Bailey had to go home to get his wallet; that he would leave the girl at his home and tell her to go home; that Bailey and Humphries' testimony conflicted as to whether the former suggested to the prosecutrix the use of a phone at 76 Forrester Street and as to whether they went back to get the girl after leaving that apartment; Bailey's explanation of how the fingerprints came to be on the light bulb; and the testimony that the group stood around in the laundry room doing and saying nothing.

tion that she had not had sexual relations with Johns, which Johns, according to the proffer, would agree with. Thus, the only genuinely impeaching value of the testimony would stem from Giles' statement, as to which the prosecutrix only testified on cross-examination that she did not *recall* having spoken to him about having relations with Johns. And that would of necessity reflect upon a claimed prior act of unchastity. Moreover, it was never made clear by defense counsel when and where this alleged conversation with Giles had taken place, nor were the circumstances surrounding it explored either by way of proffer or on the original cross-examination of the prosecutrix. Under the circumstances, there was no abuse of discretion.

Nor was there an abuse of discretion with respect to what counsel below termed her "prior false accusation" (Tr. 476). But again, the prosecutrix had testified, on cross-examination, only that she could not recall having talked to Giles about it. The proffer in this regard was totally unilluminating.

Even if error occurred, it was harmless error. The essential proposition—that the prosecutrix' veracity left something to be desired—was put before the jury through the testimony of both Giles and Johns as to her reputation for truth and veracity (Tr. 481, 490).[44]

VI. The trial judge did not commit reversible error in refusing to instruct on simple assault.

(Tr. 667-70, 720, 726, 730-31)

Appellant contends that the trial judge committed reversible error in failing to charge that the jury might find appellant guilty of simple assault[45] as a lesser of-

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[44] It is also asserted that it was error to refuse to admit over objection the police report of the offense. But there was no proffer as to why it should be admitted, nor was any foundation laid for its admission. Compare *Howard* v. *United States*, 108 U.S. App. D.C. 38, 278 F.2d 872 (1960).

[45] We cannot fathom how "the medical report and the Federal Bureau of Investigation" provided evidence supporting simple assault (Br. 35).

fense necessarily included in the offense of carnal knowledge. We disagree.

A lesser included offense instruction "should not be given unless there is evidence to justify it" *Burcham* v. *United States*, 82 U.S. App. D.C. 283, 284, 163 F.2d 761, 762 (1947). Counsel below, in forcefully objecting to the giving of the lesser included offense of assault with intent to commit carnal knowledge, took the position that the Government's evidence showed a completed act (Tr. 667, 668). Mr. Forester stated "I feel the facts do not warrant it, the facts in evidence on the Government's behalf do not show an assault. They show the actual completed carnal knowledge. . . . So we would strongly oppose any instruction in that the facts do not support it" (Tr. 669, 670). We fail to understand how appellant can argue on the one hand that there was a completed act and on the other that a simple assault charge should have been given. Later, after arguing that either the prosecutrix was to be believed or that what she had said occurred had not taken place, they suggested as a basis for the simple assault charge the testimony that the prosecutrix was pulled down the steps (Tr. 720, 726). But it was not shown that either of the men on trial had done this, nor was it suggested that either had aided or abetted in doing so.[46] Under the circumstances, the trial judge did not err in ruling that she would not give the simple assault instruction.

Assuming *arguendo* that error was committed, it was harmless error. The whole thrust of the case was such that appellants would either be found guilty of the carnal knowledge offense or of assault with intent to commit it or nothing at all. Defense counsel stressed to the jury the lack of physical evidence that Miss Robinson had been touched in any way (*e.g.*, Tr. 730-31). No mention was made of her being pulled down the steps. The focus was on the issue of penetration versus nonpenetration, and any propensity the jury might have had toward convic-

[46] In fact, both appellants placed the prosecutrix with Andrew Ford, under the steps leading to the basement, when they entered.

tion of a lesser included offense did not evidence itself in a verdict of not guilty of the offense charged but guilty of assault with intent to commit carnal knowledge. As the evidence unfolded below, it bespoke a calculated plan to maneuver the prosecutrix into the basement of the apartment. Under the circumstances, a jury which found that appellants touched the prosecutrix at all could hardly avoid the further finding that they did so with the intent to have carnal knowledge of her.[47] *Cf. Howard* v. *United States*, D.C. Cir. No. 20,328, decided December 6, 1967 (slip opinion at 4 n.2 and 10).

VII. There was no abuse of the trial court's discretion in failing to grant appellants' motion for new trial.

(J. Ct. Tr. 40, 44, 49, 50)

The principles applicable to review of denial of a motion for new trial on the basis of newly discovered evidence are fairly well settled. Such motions are looked upon with disfavor.[48] *Connelly* v. *United States*, 271 F.2d 333 (8th Cir. 1959), *cert. denied*, 362 U.S. 936 (1960); *Wion* v. *United States*, 337 F.2d 230 (10th Cir. 1964). They are traditionally entrusted to the sound judicial dis-

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[47] While there are cases indicating that simple assault convictions may be had on evidence like that adduced in the instant case, appellee submits that the application of the necessarily included offense doctrine is questionable here. Carnal knowledge requires penetration of a female under sixteen. *Wheeler* v. *United States*, 93 U.S. App. D.C. 159, 211 F.2d 19 (1953), *cert. denied*, 347 U.S. 1019 (1954). The absence of consent is a prerequisite to an assault. Under statutory rape legislation, consent is rendered immaterial to protect the immature female, and a prosecution will be successful even if actual consent exists. That same consent would negative a simple assault prosecution. *Cf. Guarro* v. *United States*, 99 U.S. App. D.C. 97, 237 F.2d 578 (1956). Certainly a 16 year old boy who has sexual intercourse with his willing 15 year old girl friend would be surprised to find himself charged with simple assault.

[48] The reason that caution should be exercised in this area is that "this privilege [of moving for a new trial on the basis of newly discovered evidence] might lend itself for use as a method of delaying enforcement of just sentences. Especially is this true where delay is extended by appeals lacking in merit." *United States* v. *Johnson*, 327 U.S. 106, 112 (1946).

cretion of the trial judge, whose decision will not be reversed on appeal except for a clear abuse of that discretion. See, *e.g.*, *Upchurch* v. *United States*, D.C. Cir. Nos. 20,664 and 21,350, decided January 26, 1968; *United States* v. *Johnson*, 327 U.S. 106 (1946); *Battle* v. *United States*, 92 U.S. App. D.C. 220, 206 F.2d 440 (1953). *Cf. Smith* v. *United States*, 109 U.S. App. D.C. 28, 283 F.2d 607 (1960), *cert. denied*, 364 U.S. 938 (1961) (no reversal except in "very plain circumstances indeed"); *United States* v. *Gantt*, 298 F.2d 21 (4th Cir. 1962) (not reviewable "except under extraordinary circumstances," citing cases from other Courts of Appeals).

It is also well settled that for the moving party to prevail, he must show that: (1) the evidence has been discovered since the trial; (2) he diligently attempted to procure the newly discovered evidence; (3) the evidence must not be merely cumulative or impeaching; (4) it must be material to the issue involved; and (5) it must be such as to probably produce an acquittal in a new trial. *Thompson* v. *United States*, 88 U.S. App. D.C. 235, 188 F.2d 652 (1951); *Mills* v. *United States*, 281 F.2d 736 (4th Cir. 1960). Failure to satisfy any one of these requirements precludes reversal on appeal.

The trial judge could have properly concluded that the testimony with respect to the use of a phone at the home of Faye Cannon was not such as to call for a new trial. The issue in the case was whether appellants raped Miss Robinson, not whether Faye Cannon had a phone which was in use or had no phone at all. Miss Robinson's reason for leaving Faye's house, which act was removed in time and space from the scene of the offense, bore neither on crime nor any corroborative elements thereof, and as such was neither material nor such as to probably produce an acquittal. Moreover, any inconsistency here related only to her credibility or was impeaching. See *Murphy* v. *United States*, 91 U.S. App. D.C. 118, 198 F.2d 87 (1952) (discovery of Juvenile Court record of prosecuting witness; denial of motion upheld); *Harris* v. *United States*, 94 U.S. App. D.C. 218, 215 F.2d 32 (1954)

(complainant denied convictions on stand, denial of motion affirmed); see also *Thompson* v. *United States*, *supra* (semble); *Brown* v. *United States*, 59 App. D.C. 57, 32 F.2d 953 (1929) (semble); *Wilkins* v. *United States*, 97 U.S. App. D.C. 66, 228 F.2d 37 (1955) (statement of prosecution witness that he was employed on a certain date later claimed to be false went to credibility; motion properly denied). Similar results follow with respect to the screams and as to whether someone put their hand over her mouth, and the trial judge could well conclude from her reading of the Juvenile Court transcript that any inconsistencies along this line stemmed more from a skillful cross-examination of an immature witness rather than any willful attempted falsifications on her part, or actual inconsistencies.

Appellants also point to the testimony of the mother of the prosecutrix as indicative of error in failing to grant a new trial. Her testimony in Juvenile Court was inconsistent with that she gave at the trial of appellants with respect to whether her daughter had changed underpants. But she candidly stated why she thought the testimony given at the later trial was the correct account of the post-rape events (J. Ct. Tr. 40, 44, 49, 50).[49] And the jury convicted appellants *without* testimony that there were semen stains on them. To the extent that the credibility of her testimony may have been affected, this essentially bore on the question of her daughter's condition which, except for the semen she said she saw on her daughter, was corroborated by four other witnesses who observed the victim after the assault. The trial judge could well have concluded, as she did, that this inconsistency was not such as to probably produce an acquittal upon retrial.

Moreover, the trial judge originally tried the case, and was in a peculiarly advantageous position to evaluate the showing made for a new trial. *United States* v. *Johnson*, *supra*, at 112; *Jefferies* v. *United States*, 215 F.2d 225,

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[49] With respect to the clothes other than the panties, her testimony was consistent with that previously given. (J. Ct. Tr. 49).

226 (9th Cir. 1954). The knowledge obtained at trial could be used in assessing the motion. *United States* v. *Garrison*, 296 F.2d 461 (7th Cir.), *cert. denied*, 369 U.S. 804 (1961); *United States* v. *Marachowsky*, 213 F.2d 235 (7th Cir.), *cert. denied*, 348 U.S. 826 (1954). Thus, the trial judge could take into account as part of her assessment the highly suspicious nature of appellants' testimony,[50] as well as Ford's prior admitted involvement in the events in the basement. She "had the opportunity, both at the trial and on motion for new trial, to place reliance on those whom "[s]he believes to have been telling the truth." *Perez* v. *United States*, 297 F.2d 648, 649 (9th Cir. 1961). The basic facts as recounted by both witnesses were otherwise consistent with the former testimony. Defense counsel did not have reproduced all of the testimony at trial, so that the rest of the testimony which resulted in Larry Bailey's conviction remains a mystery, including whether demonstrative evidence such as the fingerprints were introduced and whether Larry Bailey took the stand. Conceivably, a jury upon retrial of this case could reach a different result—that is almost inherent in the nature of the offense charged—but it cannot be said that the trial judge abused her discretion in concluding that appellants failed to show newly discovered evidence of such a character as would *probably* lead to a different result. *State* v. *Smith*, 29 N.J. 561, 150 A.2d 769, *cert. denied*, 361 U.S. 861 (1959) (test is probability, not possibility of contrary verdict).

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[50] See *Upchurch* v. *United States, supra; United States* v. *Gantt, supra; Jones* v. *United States*, 279 F.2d 433, 436 (4th Cir.), *cert. denied sub. nom. Princeler* v. *United States*, 364 U.S. 893 (1960).

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,297
No. 21,585

JAMES BAILEY,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

No. 21,298
No. 21,586

RONALD HUMPHRIES,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

APPELLANTS' SUGGESTION FOR REHEARING EN BANC

United States Court of Appeals
for the District of Columbia Circuit

FILED SEP 27 1968

Nathan J. Paulson
CLERK

J. GORDON FORESTER, JR.
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Attorney for Appellants
Appointed by this Court

Come now the appellants, by and through counsel, and respectfully suggests that this Court grant a rehearing en banc.

These cases, consolidated for appeal, involve a review of convictions of carnal knowledge under 22 D.C. Code 2801(a) (1967 Ed.) and review of the denial of motions for a new trial based on newly discovered evidence. A panel of this Court affirmed the convictions and denial of new trials on September 13, 1968, with one judge dissenting.

Appellants suggest that four principal questions are of exceptional importance and that question four, infra poses a potential conflict within this Circuit. The questions are:

1. Was there a denial of due process under the Fifth Amendment and a denial of trial by an impartial jury under the Sixth Amendment when the trial court permitted the government to question the jury panel during voir dire as to their belief in capital punishment and to excuse prospective jurors for cause who were opposed to capital punishment when the government conceded on the record that it did not seek imposition of the death penalty?

2. Is there sufficient corroboration of the corpus delecti in the offense of carnal knowledge when the complaining witness testifies that she was forcefully attacked four or five times and the medical examination shows no evidence of penetration and the FBI laboratory report of the victims clothing was negative for semen and blood?

3. Did the trial court deny appellants due process of law in her denial of the Motion for a New Trial based on material discrepancies in the

testimony of the complaining witness and her mother at a subsequent trial relating to the same offense for which appellants were convicted?

4. Does the wording of the D.C. Statute, 22 D.C. Code 2801 (1967 Ed.), permit imposition of the death penalty upon conviction of carnal knowledge?

In addition, a further question is raised as a result of the decision by the panel of this Court which held that that part of the statute which permits the jury to impose the death penalty upon a conviction for carnal knowledge is unconstitutional under United States v. Jackson, 390 U.S. 570 (1968), but held that there was "...no prejudice to appellants once they had successfully asserted their constitutional right to trial by jury."[1]

I

THE DEATH-QUALIFIED JURY

Appellants assert that the issue in this case is not resolved by Witherspoon v. North Carolina, 391 U.S. 510 (1968) and Bumper v. North Carolina, 391 U.S. 543 (1968). The issue is presented in an entirely different posture in the instant case in that the prosecutor conceded, prior to voir dire, that he did not seek imposition of the death penalty.[2] Defense counsel then requested that the government not be permitted to question the jury panel as to their views on the death penalty since this issue would not be before the jury. This request was denied, the prose-

1 / Slip opinion, page 7
2 / Transcript, page 7

cutor raised the issue on voir dire, and seven prospective jurors were excused due to conscientious objections to the death penalty.[3]

In Witherspoon, supra, the petitioner had been sentenced to death and the Supreme Court ruled that the penalty could not constitutionally be executed if those who are opposed to the death penalty have been excluded.

Bumper, supra was affirmed in that the petitioner had not been sentenced to death and the Court held that the petitioner advanced "no evidence to support the claim that a jury selected as this one was is necessarily "prosecution prone",...."[4]

In neither of the above cited cases did the prosecution concede on the record, that it did not seek imposition of the death penalty as was done here.

Why then should the prosecution be entitled to obtain a death-qualified jury when it is not affirmatively seeking this punishment? Counsel asserts that there is only one logical answer. This qualification eliminates those panelists with humanitarian views and provides a jury that is more prosecution prone.

The appellants' brief cites several studies to support the thesis that a death-qualified jury is more prosecution prone then the non-death qualified.[5] It is conceded that these studies do not establish that the panel which convicted these appellants was in fact more

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3/ Transcript, page 22-29
4/ 391 U.S. 543
5/ See appellants' brief, page 17-22

prosecution prone. However, this should not be necessary as it is asserted that the only logical reason that the government did so qualify the panel is in order to obtain a jury more favorable to the prosecution. Since death is not in issue, why else would the prosecution so qualify the panel? Counsel suggests that a jury so qualified considers itself lenient by only voting guilty without the death penalty, thereby imposing a manifest injustice on the appellants by the consideration of an issue not before the Court, resulting in a denial of due process by a jury which is highly partial.

II

INSUFFICIENT CORROBORATION OF THE CORPUS DELECTI

The evidence did in fact provide some corroboration to the testimony that the complaining witness had been attacked. There was, however, no corroboration of penetration which is the essential element of carnal knowledge. Conversely, there was strong evidence that the girl had not been penetrated and this evidence was not refuted by the government.

In addition, in a case such as this where the complaining witness is under sixteen (albeit less than two months); she has an apparent mental deficiency;[6] she was surprised by an adult in a basement area where she did not belong, and the highly prejudicial nature of a carnal knowledge charge. Appellants assert that in view of all these circum-

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6/ Testimony in general and the fact that she was completing the ninth grade at age 17 (Transcript, page 48-49).

stances, the corroboration doctrine for this jurisdiction should be reviewed by this Court en banc.

The defense produced the examining doctor from D.C. General Hospital. The doctor's findings as to penetration, sperm, and trauma were entirely negative. The defense also produced a diplomate of the American College of Gynecologists as an expert who stated, in reply to a hypothetical question, that, in his opinion, there was no penetration. In addition, the defense called an FBI agent who subjected all of the clothing worn by the complaining witness to various laboratory tests. Results of these tests were negative for semen and blood.[7/]

III

DENIAL OF THE MOTION FOR A NEW TRIAL

Appellants assert that the trial court abused its discretion in the denial of new trials based on newly discovered evidence. This evidence consisted of material discrepancies in the testimony of the complaining witness and her mother at a subsequent trial arising out of the same offense.

The discrepancies are set forth with some detail beginning at page 41 of the Brief for Appellants. It should suffice to say here that the disparate testimony related to the attempted use of a telephone by the complaining witness; if the complaining witness screamed five or

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7/ Transcript, page 437-438

six times during the attack, or whether a hand was placed over her mouth to prevent her screaming at all; if she was in fact dragged into the basement; and, of utmost importance, whether the underpants which were removed by the doctor at the hospital and turned over to the Federal Bureau of Investigation were the same pants worn during the attack.[8]

It is asserted that these discrepancies were crucial and that all of the standards set by this Court in Thompson v. United States, 89 U.S. App. D.C. 293, 188 Fed. 2d. 652 (1951) were met in this case. The evidence was not discovered until August after the trial in June. Diligence was shown in that at time of sentencing trial counsel requested authority to obtain a transcript of the new testimony. This transcript was received on November 3, 1967 and the motion was filed promptly thereafter.

The conflicting testimony was not cumulative or impeaching, but went to crucial allegations in the complaint and its materiality speaks for itself. The fact that the subsequent evidence did produce an acquittal is not in and of itself significant; however, it does meet the standard that the evidence was "...of such nature that in a new trial it would probably produce an acquittal."[9]

It is therefore asserted that a new trial should have been granted on the newly discovered evidence.

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8 / The complaining witness testified at page 88 of the District Court transcript that her underpants were never completely removed during the alleged attack.

9 / Thompson v. United States, 188 Fed. 2d. at 653.

IV

THE DEATH PENALTY IN THE D.C. STATUTE DOES NOT APPLY TO CARNAL KNOWLEDGE 10/

The D.C. Code states as follows:

> Whoever has carnal knowledge of a woman forceably and against her will, or carnally knows and abuses a female child under sixteen years of age, shall be imprisoned for not more than thirty years: provided, that in any case of rape the jury may add to their verdict, if it be guilty, the words "with the death penalty..." (emphasis supplied) 11/

Appellants assert that a plain reading of the above cited statute provides for the death penalty in rape cases only and not upon conviction for carnal knowledge. Otherwise, the limiting phrase "provided that" would not have been necessary. The wording of the statute would indicate that Congress intended to impose a more stringent penalty for a forceable rape, as opposed to the charge of carnal knowledge for which these appellants stand convicted.

This question is of particular significance here as defense counsel made a vigorous effort to exclude the issue of the death penalty from the trial.

This question is discussed in a supplemental brief filed on behalf of appellants, wherein it is pointed out that there is an historical distinction between the two offenses and that various courts

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10 / This question is raised independently of the constitutional infirmity found in Jackson v. United States, 390 U.S. 570 (1968) which was applied to the D.C. Statute by the panel of this Court in the instant case.

11 / D.C. Code, Title 22, Section 2801 (1967 Ed.).

have separated the two offenses. This same question has also been briefed in Springfield v. United States, Appeal No. 20,424 which is still pending before this Court.

It is asserted that however the panel of this Court rules in Springfield that an en banc hearing should be held on this issue.

In conclusion, it is urged that the entire Court consider these questions. It is also respectfully requested that the opinion of the dissenting Senior Circuit Judge be reviewed in light of the strong views which he expressed.

Respectfully submitted,

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Appointed by the District Court

I, J. Gordon Forester, Jr., attorney for appellants, certify that this petition is presented in good faith, that it is not interposed for delay, and that, in my judgment, the petition for rehearing is well founded.

J. Gordon Forester, Jr.